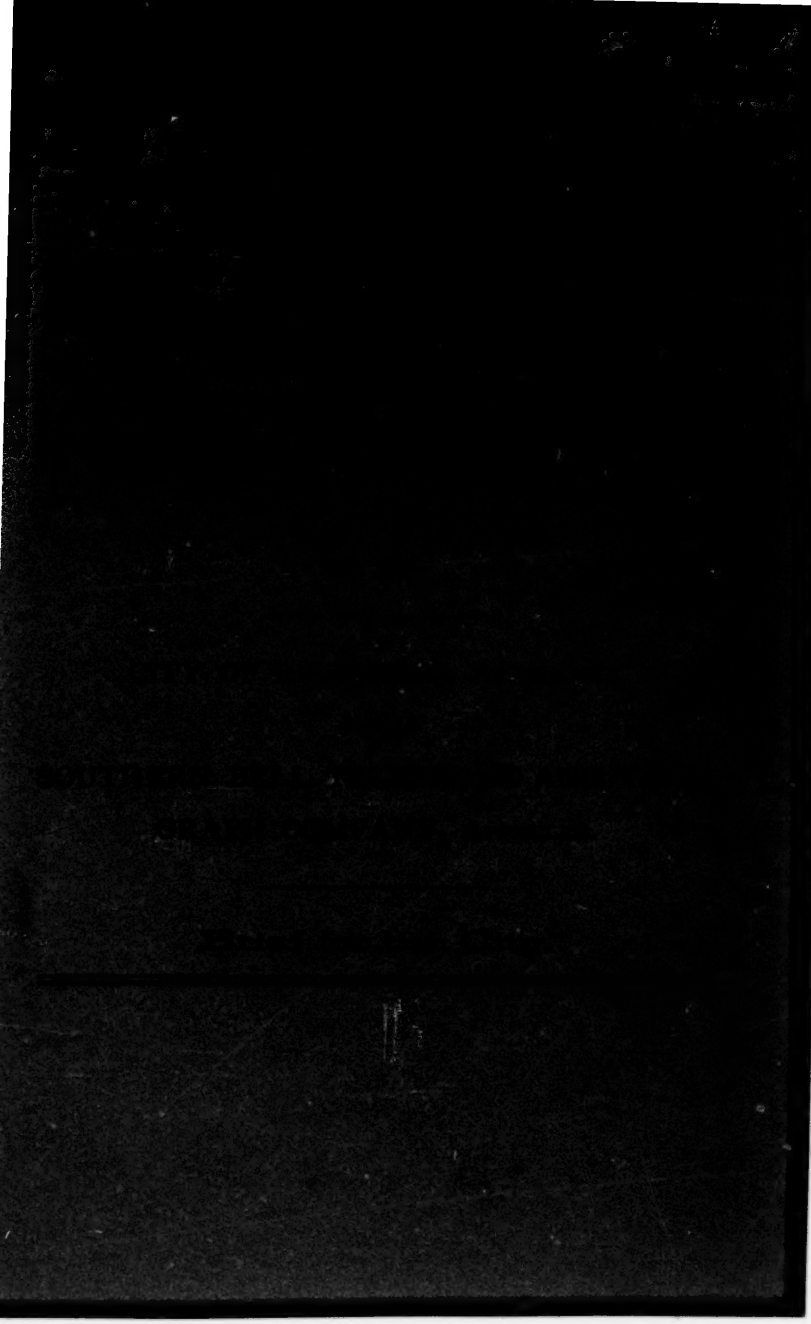

BRIEF FOR PLAINTIFF IN ERROR.

In the Supreme Court of the United States.

No. 264.

CITY OF RICHMOND, APPELLANT,

versus

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, APPELLEE.

Brief for the City.

This cause is here by a writ of *certiorari* to the United States Circuit Court of Appeals for the Fourth Circuit. The decree complained of was rendered on February 5, 1898, by said court in the above-styled cause upon an appeal to said court from a decree of the Circuit Court of the United States for the Eastern District of Virginia, entered on the 23rd day of August, 1897, in a suit therein, brought by the Southern Bell Telephone and Telegraph Company *vs.* the City of Richmond.

By the said decree of the Circuit Court it was adjudged, that the said company had, under the authority of a certain act of Congress, approved July 24, 1866, "the right to construct, maintain, and operate its lines over and along the streets and alleys of the city of Richmond, both those now occupied by the complainant company, and those not

now so occupied, and to put up, renew, replace, and repair its lines, poles, and wires over and along said streets and alleys as well as to maintain, construct the same, and to connect its lines with new subscribers along said streets and alleys, and the said city of Richmond, its agents, officers, and all others are enjoined and restrained from cutting, removing, or in any way injuring the said lines, poles, and wires of the complainant company, and from preventing or interfering with the exercises of the aforesaid rights by the complainant company, and also from taking proceedings to inflict and enforce fines and penalties on said company for exercising said rights." (See Record, page 75.)

By the decision of said Circuit Court of Appeals, that decree was reversed, and the cause remanded to the said Circuit Court with directions "to modify the terms of the injunction" granted by it, so as to conform to the opinion rendered by said Circuit Court of Appeals. The result of that decision was to affirm the decision of the said Circuit Court to the extent of holding that the said city was prevented by the said act of Congress from requiring the said company to move its poles and wires from the streets of said city, unless it would conform to two certain ordinances of the city, and that the city was also prevented by the same act from interfering with said company in extending its lines anywhere it might choose over any of the streets of said city. The said two ordinances having been held void, because they were deemed to interfere with rights granted by said act, the modification consisted in holding, that the injunction against the city was too broad, in that it did not announce in some general terms, that the poles and wires were subject to such regulations and restrictions as were then or might thereafter be imposed by said city in the lawful exercise of its police powers. The effect of the decision of the Circuit Court of Appeals was against the city, in that it declared that the company had rights, which the city denied, and that the city did not have the powers which she claimed to possess in the control of her highways. It is

because of that decision that the city has prayed that this cause and the legal principles involved may be reviewed by this court.

ACT OF CONGRESS.

The Act of Congress referred to is contained in U. S. Rev'd Statutes, § 5263, and is here quoted in full. As section 5268 is a part of the same act, and throws light upon one of the questions involved in this case, it is also quoted:

Section 5263. "Any telegraph company now organized, or which may hereafter be organized, under the laws of any State, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States, which have been or may hereafter be declared such by law, and over, under, or across the navigable streams or waters of the United States, but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads.

Section 5268. "Before any telegraph company shall exercise any of the powers or privileges conferred by law such company shall file their written acceptance with the Postmaster-General of the restrictions and obligations required by law."

STATEMENT OF CASE.

On the 11th day of December, 1879, the appellee was chartered as a telegraph company. At that time there was in existence a telephone company known as the National Bell Telephone Company, and which had, on the 10th day of November, 1879, entered into a certain contract with the Western Union Telegraph Company, acting for itself and certain other companies. Such portions of said contract as are supposed by the appellee to throw light upon the sub-

ject of this litigation are set forth in the record of this case upon pages 50 and 55. By Article I., section 1, of that contract the National Bell Telephone Company contracted to pay a certain royalty to the Western Union Telegraph Company upon all telephones used in the United States under license of the National Bell Telephone Company. By section 1, article 2, the word telephone is defined as "an instrument for electrically transmitting or receiving articulate speech." By article 6 the Western Union Telegraph Company agreed to withdraw from the manufacture, rental, and use of telephones. By article 7 the Western Union Telegraph Company agreed to allow the National Bell Company to use any of its poles, fixtures, &c., upon reasonable terms. By section 2, article 12, a telephone "exchange" is defined. By section 1, article 13, telephone exchanges may be connected, provided they are not used for the transmission of general business messages, &c., in competition with the business of the Western Union Telegraph Company. In article 14 it is agreed that the National Bell shall furnish the Western Union with telephones for use in connection with telephone lines of said telephone company. In article 15 it is provided for the delivery of messages received from telephone lines and to be delivered over the telephone lines, or received over telephone lines and to be delivered over telegraph lines; and provides for a telephone connection between the office of the telegraph company and the office of the telephone exchange. By article 17 it is provided that the contract was to go into effect on the 1st of November, 1879, and to remain in force until the expiration of seventeen years thereafter; and further shows that the Richmond exchange was not embraced within the scope of the contract; that city being embraced in the terms of a contract between said Western Union Telegraph Company and said National Bell Telephone Company with James M. Ormes, dated August 26, 1879.

Subsequently the National Bell Telephone Company was merged into the American Bell Telephone Company,

and the Ormes contract afterwards became the property of the Southern Bell Telephone and Telegraph Company. (See record, p. 62.) On September 1, 1888, the Southern Bell Telephone and Telegraph Company surrendered to the American Bell Telephone Company its privileges under the Ormes contract. (See record, p. 62.) And on the same day entered into a contract with the American Bell Company for the use of its telephones upon certain terms and conditions. (See pp. 56 to 62, record.)

By the surrender of the Ormes contract the Richmond exchange came within the scope of the above-mentioned contract of November 1, 1879. Several years previous to such surrender, the Ormes contract, so far as it pertained to the city of Richmond, became the property of the Southern Bell Telephone and Telegraph Company. For in 1884 that company applied to the city of Richmond for permission to erect poles in and run wires along the streets and alleys of the said city for telephonic purposes.

On June 26, 1884, the city of Richmond granted such permission under the provisions of an ordinance, a copy of which is filed with the complainant's bill as Exhibit K., page 26. By section 1 of that ordinance the company was authorized to erect such poles and run such wires on the streets of said city on such routes as the Committee on Streets may from time to time designate "upon the conditions and under the provisions of this ordinance." Section 2 required that it should carry certain wires of the city fire alarm and police telegraph. Section 3 required that it should furnish telephonic service to the city at a special reduction of $10 per annum for each municipal station. Section 4 forbid it from injuring shade trees. Section 5 read as follows: "The ordinance may at any time be repealed by the Council of the city of Richmond; such repeal to take effect twelve months after the ordinance or resolution repealing it becomes a law." It was under the provisions of this ordinance that the Richmond telephone exchange or plant was established by the complainant. No poles were erected or wires

run by said company, except under the said ordinance. (See answer, page 36, record.)

On the 13th of February, 1889, nearly five years after it had accepted and worked under said ordinance, the said company filed its acceptance with the Postmaster-General of the above-mentioned act of Congress of July 24, 1866.

On the 18th day of July, 1891, the City Council passed an ordinance as to the joint use of poles erected in the city of Richmond for the support of wires used in connection with the transmission of electricity. Its general object was the diminution or the prevention of increase of poles for carrying wires for electrical purposes. That purpose was to be accomplished by requiring, so far as possible, the several companies running wires for different electrical purposes to hold and use the necessary poles jointly, instead of each company having its own poles, and thereby greatly encumbering the streets of the city of Richmond. The complainant company strenuously objected to said ordinance and refused to accept it. (See bill of complainant, page 6.) Such refusal was one of the reasons that caused the City Council afterwards to repeal the said ordinance of June 26, 1884, granting, as above stated, the privileges to the complainant company. (Page 37.)

Subsequently, in 1894, there was some correspondence between the City Engineer, speaking for a committee of the City Council known as the Committee on Grounds and Buildings, and Mr. McCluer, Superintendent of the Southern Bell Telephone and Telegraph Company, at Richmond office, in regard to the desire on the part of said committee that the complainant company should furnish free telephone service to the offices of several of the city officials. The complainant company, through Mr. McCluer, declined to furnish such free service. (See pp. 13 to 16.)

For several years previous to 1894, the Southern Bell Telephone and Telegraph Company has had its office connected with the office of the Western Union Telegraph Company by telephone wires, and there connected with three sets

of telephones received from the American Bell Telephone Company, and used for receiving from and delivering to subscribers of the Southern Bell Telephone and Telegraph Company messages which were sent to and received from points in and without the State of Virginia and in foreign countries over the wires of the Western Union Telegraph Company. The method of use was as follows: A subscriber of the Southern Bell Telephone and Telegraph Company, desiring to send a telegram over the Western Union lines, calls for a connection with the Western Union office. "The clerk of the Western Union Telegraph Company at the 'phone in its office receives the message through the 'phone, puts it in writing and hands it to the operator of the Western Union Telegraph Company, who transmits it over the wires of the latter company to its destination. When a telegram is received from a point outside of Richmond over the wires of the Western Union Telegraph Company to be sent to a subscriber of the Southern Bell Telephone and Telegraph Company, the Western Union operator, who receives the message, puts it in writing and hands it to the 'phone clerk of the latter company, who has charge of one of the 'phones in its office in Richmond, who calls up the person to whom the message is directed over the 'phone and delivers it to him through the 'phone." (Page 70.) This system of assisting each other was in use when the bill in this case was filed.

In December, 1894, the City Council of Richmond referred to its Committee on Streets for its consideration and subsequent report a draft of an ordinance of a general nature as to underground conduits (See page 73, record.)

No more effect could be given to such a general ordinance as to conduits than could be given to the ordinance as to the joint use of poles, as long as the Southern Bell Telephone Company franchise was in force; so at the same meeting the Council repealed the said ordinance of June 26, 1884. (See p. 18, record.) This repeal ordinance was approved December 14, 1894, and declared that "in accordance with the fifth section of said ordinance of June 26, 1884, all privi-

leges and rights granted by said ordinance shall cease and be determined at the expiration of twelve months from the approval of this ordinance by the Mayor." On the 17th of that month the said Committee on Streets requested the telephone and telegraph representatives to appear before it and discuss the question of a general conduit ordinance. Later in the same month the superintendent of the Western Union Telegraph Company in said city appeared and discussed the matter, which was referred to the City Attorney and City Engineer for their suggestions. On the 28th day of February, 1895, the same city officials were instructed by said committee to prepare and submit "a general ordinance as to telephone conduits." (See p. 73.) That instruction resulted in the preparation and adoption by the City Council of the two ordinances filed with the complainant's bill as Exhibits "G" and "H" respectively. Both of these ordinances were approved September 10, 1895.

The ordinance filed as Exhibit "G" prescribed that no pole now erected in the city for the support of wires should remain on any street after a certain date, unless the owner or user should first petition for and obtain the privilege of erecting poles and wires for telephonic purposes in accordance with the conditions of that ordinance. It required that all such poles should be used jointly under joint expense by the several companies running wires for electrical purposes, requiring heavy current wires to be placed on one set of poles and light current wires to be placed upon another set. It subjected the poles and their erection to the supervision of the City Engineer. It required such poles to carry the wires of the Fire-Alarm and Police Telegraph Department. It required an annual statement from the owner or user of such poles of their number and locations. It required an annual fee of $2.00 to be paid to the city authorities for every such pole. It contained certain provisions for the purpose of showing that said poles were kept in safe condition, and that the wires were properly fastened and properly insulated, so as to prevent the causing of a fire

by the escape of electricity. The Council also reserved the right to put other restrictions and regulations as to the erection of poles and wires, and to require such poles, as it might from time to time deem proper, to be removed and the wires to be run underground. (See pp. 16 to 22, record.)

The said ordinance, filed as Exhibit "H," specified certain streets in the busier and more crowded parts of the city, in which no poles should remain after a specified date; but required that in this portion all wires for the transmission of electricity, except trolley wires, should be run in underground conduits. In order that the city's streets might not be torn up too frequently, to the great inconvenience of its citizens, the ordinance required that any conduit built under its provisions should be built of a sufficient capacity to carry not only the wires then in said streets and alleys, but to provide for the increase thereof to at least 100 per cent., or double the capacity required for present needs, and that the wires of the city should be carried free; and that other companies should be allowed, when they should have obtained the consent of the City Council thereto, to use said conduits upon reasonable compensation to be determined by arbitration. It required certain compensation to be paid to the city for the use of its streets in this manner. It contained minor details specifying that the construction of the conduits and the placing of the wires therein should be subject to the supervision of the proper city officials. (See pages 23 to 26.)

The complainant company refused to accept or operate under either of said ordinances. And instead of recognizing as binding upon it the said repeal ordinance of December 14, 1894, by removing its poles and wires, it went on the 6th day of October, 1896, into the Circuit Court of the United States for the Eastern District of Virginia and filed its bill of complaint in this suit.

PLEADINGS.

Acting under the prayer of the said bill for an injunction restraining the city from interfering with its poles and wires in said streets and alleys, or with the erection of new poles and wires, or with the operation of its business, the Court granted a preliminary order restraining the city of Richmond from "injuring or in any way interfering with the poles, wires, instruments, or business of the plaintiff in said suit along and over the routes in said city now used by it; from interfering in any way with the proper use, maintenance, or repair of said poles, wires, and instruments of said plaintiff; and from taking proceedings to impose fines and penalties on said plaintiff for using, maintaining, or keeping in repair its said poles, wires, and implements until the further order of the Court; but leave is given the defendant upon ten days' notice to move to vacate this restraining order."

The complainant's bill alleges the incorporation of the company under the laws of New York and its residence in said State, and the existence of the city of Richmond as a municipal corporation under the laws of the State of Virginia. It alleges that the company was duly organized, and that it has been engaged for about fifteen years in constructing, maintaining, and operating telephone lines in Virginia and several other States; and during that time it has continually maintained exchanges at various places in said States and the said city of Richmond; that it has maintained during that time the poles and wires and necessary instruments and apparatus for telephonic communication, and has erected and maintained, in conducting said business, numerous poles and wires in and along certain streets and alleys in the city of Richmond, and it has erected and maintained said lines, wires, and poles under authority of the Council of the city of Richmond, Legislature of the State of Virginia, and acts of Congress of the United States. That, in the conduct of its business, it has maintained in the city of Richmond an

office or telephone exchange connected by wires with a large number of subscribers, and with the office of the Western Union Telegraph Company in said city; that many of said subscribers are connected through said exchange with the office of the Western Union Telegraph Company, and many of said subscribers do transmit and receive through their instruments on said premises, through said exchange to and from the office of the Western Union Telegraph Company, messages addressed and intended to be sent and received, and which are sent to and received from points in other States, in the District of Columbia, and foreign countries; your said orator having for years received and transmitted such messages in this manner under agreement still in force; and it also has subscribers outside of the city of Richmond, whose 'phones connect with the other 'phones of your orator in said city, by any through the means of wires and poles of your orator located on and along the streets and alleys of said city, many of which customers have no ready and convenient access to said Telegraph Company except through the use of your orator's wires and poles for the transmission and receipt of telegrams between them and points outside the State of Virginia, and use said 'phones, wires, and poles of your orator in connection with said Western Union Telegraph Company, for that purpose, under and by virtue of an agreement between your orator and said Western Union Telegraph Company for the joint use of the poles and fixtures for said companies in sending and receiving such messages; and that part of such transmission from the office of your orator's subscribers to and from the office of the Western Union Telegraph Company, of messages addressed and sent by telegraph to and from points outside of the State of Virginia, to the District of Columbia, and to foreign countries, is interstate commerce, and is commerce between said points outside of the city of Richmond and the city of Richmond and other States and the District of Columbia and foreign countries, and is a necessary part of the business of your orator, and that its said wires in the city of Richmond,

and its poles, to which they are attached, are used for that purpose."

The bill also alleges that it is the intention of the company to extend its business and lines across and beyond the city of Richmond, and State of Virginia, and into other countries and States. It alleges that its wires, poles, and lines in said streets and alleys of the city of Richmond constitute a part of the postal service of the United States; that every day it has to connect many of its subscribers with the office of the Western Union Telegraph Company for purposes of communication by means of the lines of said telegraph company between said subscribers in Richmond and their correspondents in other States. It alleges that its continuance as a telephone exchange is an essential and necessary part of the business of its subscribers; that its business and status is that of a telegraph company under the laws of the United States. It alleges its filing its acceptance of said act of Congress of July 24, 1866; and that by virtue of said acceptance it is entitled to operate lines of telephones over and along the post roads of the United States, and that the streets, alleys, and highways of the city of Richmond are among such post roads. It further alleges that the several departments of the United States located in Richmond used the lines and wires of said company for transmission by telephone of instructions, orders, and information in the administration of governmental affairs. It alleges that, in addition to its rights under said act of Congress, it was duly authorized to construct and maintain said telephone lines under section 1287 of the Code of Virginia (1887) along and over the streets and alleys of any city in said State, with the consent of the Council thereof. That, relying on its rights, it erected poles and wires in said streets and alleys and conducted its business therein and executed many contracts to furnish telephonic facilities to residents of Richmond, persons outside of said city, and to the officers and agents of the Federal Government. It alleges that under the said act of Congress it is entitled to maintain and operate its lines with-

out regard to the consent of said city, and did, in fact, locate many poles and wires and began operation of its business without such consent. It alleges that the city did, on the 26th day of June, 1884, after it had begun to operate its business in pursuance of section 1287 of the Code of Virginia, pass the ordinance giving its permission to erect poles and run suitable wires upon the streets of said city, and states further, in substance, the terms of said ordinance and filed with the bill a copy of said ordinance as Exhibit "K"; that, after the passage of said ordinance and in pursuance of the terms thereof and relying thereon as well as on the rights granted by the laws of the United States and State of Virginia, hereinbefore referred to, and before the attempted repeal of said ordinance, it erected poles and wires and operated telephone lines along and over the said streets of the city of Richmond. It alleges that while it was so conducting its business the city of Richmond, through its officials, began to make demands not only outside of its agreement with said city, but which were injurious to the company's business. It then alleges the passage of the ordinance of July 18, 1891, requiring the joint use of poles. It alleges that threats were made by some of those in authority in said city that, unless the company submitted to the requirements of the last-named ordinance, it would be driven from the city. It alleges that early in the year 1894 a demand was made upon the company for a number of free 'phones for the use of the city officials. It filed with its bill the correspondence about free 'phones between the City Engineer and Mr. McCluer, which has already been alluded to. It alleges that many threats were made of driving the company from the city, if the demands for free 'phones were not granted. It alleges the passage of an ordinance of December 14, 1894, repealing the ordinance of June 26, 1884, and files a copy as Exhibit "F." It alleges the passage of the two ordinances approved September 10, 1895, above mentioned, and files copies of the same as Exhibits "G" and "H." It alleges that the power to repeal an ordinance

does not contain the power to compel the removal of the poles and wires.

It alleges that the repeal ordinance cannot be construed to mean that such removal shall take place, and alleges that the reserved power of repeal and the repeal ordinance itself was only intended to prevent the granting of new routes by the Committee on Streets. It also insisted that the fifth section of said ordinance of June 26, 1884, reserving the right of repeal was *null and void* upon the ground that the City Council had no power to repeal, and that such power lay entirely in the Legislature of Virginia under section 1290 of the Code of Virginia. It further insisted that, having accepted the provisions of the act of Congress, it was entitled to the rights given by said act independent of, and superior to, that of the city of Richmond. It insists that telephone companies are embraced in the terms of said act of Congress. It then alleges that the city had granted a new telephone company, a rival of the complainant, the right to erect poles and wires along many of the same streets and routes which the complainant then occupied, and to put many of its poles along side the poles of the complainant. It alleges that the city claims the right not only to prevent the company from erecting new poles and wires and extending its lines, but to make it remove its then existing poles and wires. That the officers of the city alleged that the complainant had no right to occupy said streets and alleys of the city. That the ordinances before mentioned are a constant menace to its rights and privileges and intended to deter persons from making contracts with it. That its contract rights, franchise, and property will be destroyed, unless afforded protection asked for in the bill, and to that end prays that the city may be restrained and enjoined from "removing or interfering with its poles and wires in said city, and from interfering with the right of your orator to use said poles and wires, and that all proceedings by said city or its agents and others to prevent your orator from continuing, renewing, repairing, and extending its lines, wires, and poles in, along, and over the

streets and alleys of the said city, and to inflict fines and penalties on your orator for so doing, may be restrained and enjoined; that the right of your orator to use said poles and wires and to carry on its said business along and over the streets of the said city be declared and defined; that the ordinances of said city of the 14th of December, 1894, and of the 10th of September, 1895, so far as they undertake to prevent your orator from maintaining and using its lines, poles, and wires over and along the streets and alleys of the city of Richmond from repairing, renewing, and extending its said poles, wires, lines, and routes as its business may require may be declared *null and void*."

With the bill were filed the exhibits which have already been referred to.

On the 16th day of November, 1896, the city filed its demurrer to the bill, and for causes of demurrer alleged: That the bill was insufficient. That the act of Congress of July 24, 1866, does not apply to the complainant, but only to telegraph companies. That the said act, even if it applied to the complainant, does not give it any right to run its lines along the streets of the city without its consent and subject to reasonable regulations both as to occupancy of the streets and compensation for such use. That, if the act of Congress put the complainant as free of control of the city as it claimed in said bill, it is unconstitutional and void. That the manner of determining as to the routes of the poles and wires of the complainant and the compensation to be paid to the city was agreed upon in said ordinance of June 26, 1884, upon condition that the city should reserve the right to repeal said ordinance and require the complainant to remove its poles and wires as provided in said ordinance. That the said ordinance of July 26, 1884, was an agreement between the city of Richmond and said company, and the city in passing said repeal ordinance of December 14, 1894, was merely exercising the right reserved in said agreement. That under the Statute of Virginia referred to in said bill, respondent was given authority to reserve such power of revoca-

tion. That the power of such revocation had been properly exercised in said ordinance of December 14, 1894.

By consent, the hearing on said demurrer and restraining order was postponed until January 14, 1897, on which day the cause came on to be heard on said demurrer. Upon the argument of the demurrer the constitutionality of the act was admitted by the city. (See page 32.)

On January 24, 1897, the court filed an opinion overruling the demurrer. (See pp. 35 to 40.) And on March 15, 1897, entered an order, in accordance with said opinion overruling said demurrer, continuing the injunction until the further order of the court, and gave leave to the city to file its answer.

On March 30, 1897, the city filed its answer.

The city admitted that since 1884 the complainant had been maintaining and operating a telephone exchange, and had erected its poles and run its wires along the streets of said city; but denied that it had carried on said business, or used said streets for such purposes under any authority, except that of the City Council of Richmond and the Legislature of Virginia. The city called for proof of the alleged agreement between the complainant and the Western Union Telegraph Company. It denied that the sending of any messages over the wires of the complainant to be transmitted subsequently over the wires of said telegraph company to points outside of the State of Virginia was interstate commerce; or that such was a necessary part of the business of the complainant. It denied that the said wires, poles, and lines of the complainant constituted a part of the postal service of the United States, or that the business of the complainant was essential to the business of its subscribers for communication outside of Virginia. It denied that the business and status of the complainant, so far as it concerned its Richmond exchange and its poles and wires on the streets of said city was a telegraph company. It alleged that, while the complainant may have been chartered as a telegraph company, yet that, so far as its Richmond exchange was

concerned, it did no business as a telegraph company. It denied that the complainant was entitled to the protection given by the provisions of said act of Congress of July 24, 1866. It insisted that the departments of the United States Government, located in Richmond, only used said telephone exchange as any other subscriber did. It denied, and called for proof, that the complainant ever erected any poles or wires in said streets and alleys before applying to said city for permission so to do. It admitted the passage of the ordinance of June 18, 1891, as to the joint use of poles; and alleged the same reasons which have been heretofore stated for its passage. It denied knowledge of any threats having been made that the business of the complainant would be ruined, and asserted that no such threats were authorized by the city. It admits the passage of the repeal ordinance of December 14, 1894. It alleged that the Council intended, before the lapse of the twelve months required to make the repeal ordinance effective, to pass a general ordinance relating to telephone poles and wires; and did pass two such ordinances, approved September 10, 1895, copies of which are filed as exhibits with the bill. It denies that, if the complainant filed a petition for the continuance of its poles, it would have to agree to remove them should it fail to obtain such permission. It denies the construction put upon its reserved power to repeal, and the effect of said repeal ordinance. It denies that the acceptance of said act of Congress rendered the complainant independent of the control of the city of Richmond as to the poles and wires erected under the ordinance of June 26, 1884, and insisted that, having entered under the contract contained in the last mentioned ordinance, it was bound to obey in law the terms of that contract. It denies that telephone companies were intended to be embraced in the scope of said act of Congress. It admits that it has allowed the Richmond Standard Telephone Company to erect its poles and wires on certain streets and alleys of the city of Richmond; the latter company having accepted the terms of said ordinances approved

September 10, 1895, which are in this cause so vigorously denounced. It asserts that had the complainant company accepted the terms of said ordinances, then the Standard Company, had it entered at a later date, would have been obliged to have placed its wires, as far as practicable, on the poles of the complainant company; and insists that the complainant company having refused to accept said terms, and the Richmond Standard Company having erected its poles in pursuance of said terms, the complainant company must, when it run its wires under any authority, place them upon the poles of the Richmond Standard Company in accordance with the terms of the ordinance of September 10, 1895, as to the joint use of poles. It alleges that it had expressed no intention of giving any order to any of its officers to cut down the poles of the complainant company, and had done nothing to justify such fear.

The ordinance of September 10, 1895, filed as Exhibit "H" with the bill of complaint, provides a method for testing when a telephone pole is unlawfully in the street. That method is to summon the offender before one of its courts of lawful jurisdiction, and there have the right determined.

At May rules, 1897, the complainant company filed its replication. The evidence was then taken by both sides; but was taken by way of consent, as will be seen in the statement of the evidence on pages 42 to 73; and a statement of agreed facts from pages 73 to 75. The evidence so introduced and the facts agreed have been already sufficiently stated in the statement of the case as not to need repetition.

On the 23d of August, 1897, the Circuit Court entered the decree above complained of. On the 28th day of August, 1897, the city moved the Court to modify its decree "in this cause of August 23, 1897, by inserting therein after the words 'construct and operate the same,' the following words, to-wit: 'So far as to receive from and deliver to the Western Union Telegraph Company messages sent from beyond the limits of the State of Virginia, or to be sent be-

yond the said limits,' and by inserting therein after the words 'interfering with the exercise of the aforesaid rights by the complainant company,' the following words, to-wit: 'So far as the reception from and delivery to the Western Union Telegraph Company of any message sent from beyond the limits of the State of Virginia, or to be sent beyond said limits,' but the counsel for the complainant objected, and the Court, intending by said injunction to enjoin the city from interfering with the local business and messages, as well as those of an interstate character, doth decline and refuse to so modify said decree." (See page 76.)

Your petitioner duly filed its petition of appeal from said decree of August 23d, and stated the following assignment of errors:

ASSIGNMENT OF ERRORS.

1st. The Court erred in entering said temporary restraining order.

2d and 3d. That the Court erred in not sustaining the city's demurrer, and in overruling the same, and in entering the decree of March 15, 1897.

4th. That the Court erred in the said decree of August 23d in failing to pass upon the effect had upon the alleged rights of the complainant by the said statute of Virginia and the said city ordinance of June 26, 1884.

5th. That there is error in said decree because a telephone company is not a telegraph company under said act of Congress.

6th. Because if said act of Congress does embrace telephone companies, it only embraces such as do an interstate business and only to the extent of its interstate business; while the complainant only does a local business.

7th. Because, even if the complainant does an interstate business it also does a purely local business, and yet the Court in its decree refuses to recognize such a distinction, and enjoins the city from interfering with the business of

the company, even as to messages sent from one point in the State to another, or even from one point in the city to some other point therein.

8th. Because there was never any contract between the complainant company and the Western Union Telegraph Company which made the telephone business of the complainant company, or any part of it, interstate commerce.

9th. Because if there ever was any such contract it terminated on the 1st day of November, 1896.

10th. That even if there now existed any such contract which made any of the messages be of the nature of interstate commerce, yet the city should not have been enjoined from interfering with the business of the company as to messages sent from one point of the State to another, or from a point in said city to some other point therein.

11th. Because the decree gives the complainant the unrestricted right to erect poles anywhere in said city without being subject to the said ordinance of September 10, 1895, filed as Exhibit " G " with the bill of complainant, or in any of its provisions.

Upon the argument of said appeal before the Circuit Court of Appeals, the city admitted the constitutionality of the act of Congress. (See page 87.) On February, 1898, the said appeal was decided. In the opinion of the majority of the last-named court, being Judges Simonton and Purnell, all of said assignments of errors, except the eleventh, was in substance overruled, though not specifically. The eleventh assignment was only held good in part. As to it, the Court said as follows: (See pages 90 to 91.)

" This being so, the injunction granted by the Circuit Court is too broad in its language and effect. There should have been the recognition of a proper exercise of the police power by the municipal corporation, and the use by the complainant of its poles and lines should have been declared to be subject to such regulations and restrictions as may

now or may be hereafter imposed by the City Council of Richmond, in the proper and lawful exercise of the police power.

"The only remaining question is, do the ordinances of the city of Richmond prescribe regulations which will make the use burdensome and intolerable and practicably impossible?

"It belongs to the Legislature to exercise the police power of the State, subject to the power of the courts to adjudge whether any particular law is an invasion to rights secured by the Constitution. *(Mugler* vs. *Kansas,* 123 U. S. 623.) The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business of, or impose any unnecessarily restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police power is not final or conclusive, but is subject to the supervision of the courts. *(Lawton* vs. *Steele,* 152 U. S. 137.). If this be the case with regard to the Legislature, *a fortiori,* it applies to a municipal corporation, the creature of the Legislature.

"On examination of these ordinances it will be seen that as a condition precedent to the use of the streets of Richmond, a petition must first be filed for the purpose of erecting and maintaining poles and wires for telephone purposes in accordance with the conditions of that ordinance, and such other conditions as the Council may see fit to impose. (Ordinance approved 10th September, 1895.) The seventh section of this ordinance expressly reserves to the City Council the right to put at any time other restrictions and regulations. And the whole tenor and effect of the ordinance is to put the company absolutely under the control of the city. And the terms of the ordinance are enforcible under heavy penalties. The next ordinance, the one providing for wires in conduits, after providing that the City Council may compel the removal of wires from poles overhead in certain streets, and the putting them in conduits in certain streets, under a penalty of not less than $100 or

more than $500 for each pole per week, provision is made for permission to build conduits of sufficient capacity to accommodate the wires in such streets, and to provide for an increase thereof to at least the extent of 100 per cent., the increase of space not to be occupied by the party building the conduits without the consent of the Council, the conduit to be used for the wires of the Council free, and the City Council to allow any other person or corporation to use such conduit for wires upon paying compensation in the mode prescribed by the City Council. This privilege of building and owning conduits to last no longer than fifteen years, at the end of which time the city may put other restrictions, conditions, and charges as it may see fit, or may order their removal at the expense of the owner. The charge for using or owning any wire in any such conduit shall be for each year until January 1, 1900, $2 per wire per mile. After January 1, 1900, such larger commission for the rest of the term as the City Council may see fit. These are some of the conditions now imposed with the right to impose any others which Council may see fit. Now it goes without saying that if the complainant, notwithstanding its claim of protection under the act of Congress of 1866, were willing to file a petition to the City Council for the privilege of using its streets and alleys, and in that petition agreed, in consideration of its grant, to abide by any present or future condition, regulation, or restriction the Council may impose, this would be a binding contract, and would control the complainant. (*R. R. Co.* vs. *Ryan*, 153 U. S. 436.) Whatever the rights of the complainant may have been under such a stipulation, it would surrender them and come within the absolute domination of the City Council. The courts could not review any ordinance to discover if it be within the lawful exercise of the police power, for the complainant would be bound by its contract to obey the ordinance, be it police regulation or not.

"These conditions, regulations, and restrictions already prescribed by the City Council appear to be stimu-

lated by a desire to press and control, perhaps defeat, the existence of the complainant, and so are not the lawful exercise of the police power.

"Let the case be remanded to the Circuit Court with instructions to modify the terms of the injunction therein granted, so that it may conform to the principles declared in this opinion, the costs of the case to be equally divided between the parties."

Judge Brawley delivered the following dissenting opinion:

"I concur in the result, but am not inclined to assent to so much of the opinion as holds that a telephone company, such as is described in this case, and whose business is local in character, is within the purview of the act of Congress of July 14, 1866, relating to telegraph companies."

Upon the rendition of its decision by said Circuit Court of Appeals, and entry of decree, the city applied to this court for a writ of *certiorari*.

REASONS FOR WRIT OF CERTIORARI.

Your petitioner submitted the following reasons why the said decree of affirmance should be brought here for review by this Court:

First. The questions of law involved in the affirmed decree as above stated are of great importance and general interest, because they very materially concern the extent and the limits of the power of municipalities over the construction and operation of telephone companies in their midst, and, if allowed to remain unchallenged and settled by said decree of affirmance, will of necessity govern future decrees involving such questions in said circuit, and greatly affect similar litigation arising in other circuits.

Second. As affecting the rights of all telephone companies and the powers of all municipalities in this country, it is most desirable, if not necessary, to have it authoritatively decided. 1st. Whether any telephone company is embraced within the scope of the said act of Congress of July 24, 1866. 2d. Whether a telephone company doing a *local* business only is within the purview of said act. 3d. Whether a telephone company doing both an interstate and a *local* business is beyond the interference or control of a municipality as to its *local* business as well as its interstate business.

The said opinion and decree of affirmance is in direct conflict with decisions of this court as to the control of State authorities over telegraph messages or freight charges of a local, and not of an interstate character.

Third. It is of great importance that municipalities should know to what extent they can impose restrictions and conditions upon telephone companies using their streets.

Fourth. That the Circuit Court of Appeals erred in deciding that a telephone company is embraced in the act of Congress of July 24, 1866.

Fifth. That the Circuit Court of Appeals erred in holding that the complainant comes within the protection of the said act of Congress. 1st. Because its business is of a local and not of an interstate nature. 2d. Because, even if the complainant is entitled to the protection of said act as to its business in connection with the Western Union Telegraph Company, yet it was not put by said act above municipal control as to its purely local business, viz: Messages which never left the limits of the city, much less the limits of the State.

Sixth. The Circuit Court of Appeals erred in holding that, although the lines of the complainant were erected and constructed under the terms set forth in the contract—ordinance of June 26, 1884, yet that the company had the right to remain in occupancy of the streets of your petitioner after said ordinance had been repealed by a valid ordinance.

Seventh. The Circuit Court of Appeals erred in holding that the restrictions and conditions set forth in the two ordinances heretofore mentioned of your petitioner, and approved September 10, 1895, and commented upon in the opinion of that court, were void as not being lawful exercise of the police powers of your petitioners.

The said writ having been granted by this court, the appellant now urges the said fourth, fifth, sixth, and seventh reasons as setting forth errors calling for a correction by this court of the decrees of the lower courts.

ARGUMENT.

The several questions which materially affect the merits of this controversy are as follows:

1st. Does the said act of Congress of July 24, 1866, embrace within its scope telephone companies?

2d. Even if it embraces any of such companies, does it cover the Richmond Exchange of the complainant company?

(*a*) As to messages sent by 'phone to the office of the Western Union Telegraph Company, thence to be forwarded over the lines of the latter company to some point without the State of Virginia, or messages received from some such point over the wires of said telegraph company at its office, and sent from there over the wires of the complainant company to the intended recipient in Richmond?

(*b*) Even if the act applies to such messages, can it give any protection to telephonic messages sent from one part of the State of Virginia to another, or from one point in the city of Richmond to another?

3d. Do the lines and business of the company "constitute a part of the postal service of the United States"?

4th. Even if the entire business of the company would have been within the scope of said act, had its lines been established after it had accepted the terms of said act, and

been constructed under its protection, yet having been constructed and established under the contract contained in said ordinance of June 26, 1884, can it now refuse to comply with the terms of said contract, and claim as a protection its delayed acceptance of February 13, 1889?

5. Did the Council of the city have the power to pass the repeal ordinance of December 14, 1894, and is it sufficiently broad to require the removal of the poles and wires already erected?

6th. The decree of the Circuit Court is erroneous, in that it empowers the company to enter upon and use the streets free from any control or regulation of the city, however reasonable.

7th. The decree of affirmance is erroneous in affirming in the main the decree of the Circuit Court, and also in declaring the provisions and conditions of the two ordinances approved September 10, 1895, to be improper and void.

A discussion of the above questions will be a substantial presentation of all the errors complained of.

Before discussing the points in dispute, it may be well to state that there are some questions, which we recognized in the lower courts and here recognize, need not be discussed, as long as the law pertaining to them shall remain as now declared by the Supreme Court of the United States.

1st. We recognize the constitutionality of the above-mentioned act of Congress. (*Pen. Tel. Co.* v. *West. Un. Tel. Co.*, 96 U. S., 1; *Tel. Co.* v. *Texas*, 105 U. S., 460; *West. Un. Tel. Co.* v. *Massachusetts*, 125, U. S., 530; *St. Louis* v. *West. Un. Tel. Co.*, 148 U. S., 92 and 149 U. S., 465.)

2d. We recognize, as declared by act of Congress, that all streets, which are letter-carrier routes, are post roads. (*St. Louis* v. *West. Un. Tel. Co.*, 148 U. S., 92 and 149 U. S., 465.)

3d We recognize that under said act of Congress a telegraph company can obtain a right of way for its poles

and wires through a city and along its streets against the wish of the municipality. (*St. Louis* v. *West. Un. Tel. Co.*, 148 U. S., 92 and 149 U. S., 465.)

With these questions eliminated, we come to the discussion of the first question in dispute as above stated

SCOPE OF THE ACT.

The complainant company claims that it is embraced within the meaning of that act. It claims that the words "any telegraph company" embrace and include telephone companies. As was said by the Supreme Court of the United States in *St. Louis* vs. *West. Un. Tel. Co.*, 148 U. S., 92: "This is not the first time that an effort has been made to withdraw corporate property from State control, under and by virtue of this act of Congress."

It may be, that messages sent by telephone, like those sent by telegraph from one State to another, are a species of interstate commerce. But it would not follow from that that telephone companies are embraced in said act, and entitled to the extraordinary privileges granted thereby. The carrying of passengers and freight are also species of interstate commerce, but it is not pretended that railroads come within the scope of the act. Railroad companies were omitted from the scope of the act, although well known at the time of its passage as necessary means of interstate commerce. Why, then, is it claimed that telephone companies are covered by its terms, when such companies had never been heard of at the time of the passage of the act? Only because of a partial similarity between a telegraph and a telephone!

In the terms of the act of Congress there is nothing which tends to suggest that the words "telegraph" and "telegram" were intended to be read, except in their well-known and ordinary acceptations. No better idea of the general acceptation of those terms can be given than the

definitions given by the *Albany Evening Journal* of August 6, 1852. That journal, speaking of the coinage of a new word, said: "It is telegram instead of telegraphic dispatch or telegraphic communication. * * * * Telegraph means to write from a distance. Telegram, the writing itself, executed from a distance." (See Century Dictionary under "telegram.") On the other hand, the word "telephone" is defined in the contract in this case between the Western Union Telegraph Company and the National Bell Telephone Company as "an instrument for electrically transmitting or receiving *articulate speech*." (See page 50, article 2.)

It is true, that telephone wires, like telegraph wires, carry communications between persons distant from each other. It is true that among the material means necessary for the carrying of such communications, are poles and wires, and that the power used for such transmission is electricity. But there the similarity stops. The art of conveying a message by telegraphic dots and dashes is distinct from that of transmitting a conversation by a telephone. The difference between the two arts is fully recognized in the contract last above mentioned. In that contract it was virtually agreed that the Western Union Telegraph Company was not to go into the telephone business, and the telephone company was not to go into the telegraph business. (See page 50, article 6; page 51, article 13 (1); page 53, article 15 (3).) That contract furnishes a practical illustration of the well-recognized difference. That contract was doubtless the end of the litigation alluded to in the telephone cases (126 U. S., on page 546-7). So separate and distinct are the arts, that the Morse patent for the telegraph did not prevent the issuance of the patent to Bell for the telephone, as for a "*new and unknown art*"—a recognition that the two arts or scientific discoveries were distinct from each other. In the telephone cases *(supra)* this court recognized and adjudged that Mr. Bell had discovered not merely a new instrument for the transmission of sound, but had discovered the new and unknown art of transmitting the sounds of articulate speech. And it

is because of this difference that the American company and its branch companies have been enabled to reap their royalties. After so important an announcement by the highest judicial voice of the nation, can it be successfully contended that the terms, descriptive of the earlier art, and found in the Act of Congress, passed before the discovery of the later art, embraces the latter? Can a discovery be so separate and distinct from all those which preceded it as to entitle the discoverer to a patent for a new and unknown art, and yet be embraced within the scope of an act, passed previous to the discovery, and intended at the time of its passage to embrace only one art, which was then known? We submit that such a suggestion, embodying a palpable contradiction, cannot be acceptable to a court of justice.

In the construction of the words "any telegraph company," as used in the act of Congress, *the effect and extent of the power* conferred by the act should have great weight. While it is true that the power conferred by said act of Congress upon telegraph companies has been adjudged and established, yet it will not be denied that the granting of such power was a great advance upon what had theretofore been regarded as the extent of the power of Congress under the interstate commerce clause of the Constitution. Before the decision of *Pen. Tel. Co.* v. *West. Un. Tel. Co., supra,* the power of Congress as to interstate commerce had been regarded as confined to protecting such commerce, when existing, from being interfered with by the States. But by the act under discussion Congress claimed the right to enlarge the powers of the instrumentalities of interstate commerce. It ceased confining itself to merely preventing a State from hampering the instrumentalities of commerce, existing within its limits; it claimed the power to authorize such instrumentalities, existing in one State, to enter another, and not only to pass over, but to permanently occupy portions of the highways of that State.

We repeat that it will not be denied that the act confers extraordinary power upon the instrumentality named in it.

We call attention, however, to the fact that while Congress thus claimed the right to confer this great power, it did not in fact confer it, except upon *one* of the instrumentalities of interstate commerce, viz., telegraph companies. And we insist that no presumption should be allowed, that it was the intention of Congress to confer it upon any other instrumentality.

"Grants of immunity from legislative governmental control are never to be presumed." (*Ruggles* vs. *Illinois*, 108, U. S., 526-531.)

This principle of construction, which is here asked to be applied, is nothing more or less than that the rule applied in the construction of charters or grants of privileges or franchises. No reason can be given why the same rule should not apply. The power given in the said act of Congress is a privilege, and therefore to be construed like any other franchise granted any other corporation. In Cooley's Const. Limt'ns, 6th Ed., p. 487, it is said:

"'When a State,' says the Supreme Court of Pennsylvania, 'means to clothe a corporate body with a portion of her own sovereignty, and to disarm herself to that extent of the power which belongs to her, it is so easy to say so, that we will never believe it to be meant, when it is not said. In the construction of a charter to be in doubt is to be resolved, and every resolution which springs from doubt is against the corporation. If the usefulness of the company would be increased by extending (its privileges), let the Legislature say it, but let it be remembered that nothing but plain English words will do it.' This is sound doctrine, and should be vigilantly observed and enforced.

"And this rule is not confined to the grant of a corporate franchise, but it extends to all grants of franchises and privileges by the State to individuals, in the benefit of which the people at large cannot participate."

See also *Mills* vs. *St. Clair County*, 8 How., 569; *Saginaw Gas Co.* vs. *Saginaw*, 28 Fed. Rep., 529-39-40.

There are serious difficulties as to possession of such power by telephone companies, which do not exist as to telegraph companies. The great multiplication of poles and wires needed for telephone service is no slight evil in cities. The Supreme Court of the United States in *St. Louis* vs. *West. Un. Tel. Co.*, 148 U. S., pages 92 and 99, recognized this evil. The Court said:

"The use which the defendant makes of the streets is an exclusive and permanent one, not one temporary, shifting and in common with the general public." * * *

"It as effectually and permanently dispossesses the general public as if it had destroyed that amount of ground. * * * By sufficient multiplication of telegraph and telephone companies the whole space of the highway might be occupied, and that which was designed for general use for purposes of travel entirely appropriated to the separate use of companies and for the transportation of messages."

This is no fancied, but a real evil. The experience of cities teaches that, when the streets are open, without municipal restraint, to the occupancy of corporations for their instrumentalities of trade, such as gas and water pipes and wires for the various electrical purposes, corporations are frequently formed merely for the purpose of forcing the earlier and existing corporations to buy them out. In the meantime the streets have been used and occupied and injured for their purposes. The language of Allen, Judge, in *Pierce* vs. *Drew*, 136 Mass., on page 85, although used in a dissenting opinion, is entitled to great weight because of its strong statement of facts, known of all men. He says: "When a telegraph line consisted only of a single row of small posts, with a few wires, the matter was of less importance. But common observation shows that now the posts

are large and numerous, fitted with cross beams adapted for layer after layer of almost countless wires; and the establishment of the different kinds of electrical lines involves to some extent the destruction of trees along the highways or streets, an occupation of the ground, a filling of the air, an interference with access to or escape from buildings, an increased difficulty in putting out fires, an obstruction of the view, a presentation of unsightly objects to the eye, and a creation of unpleasantness in the wind."

The use and occupancy of a street by a telegraph company is a matter of but small moment, for the poles and wires upon its route from its office to the limits of the city are comparatively few, and go through the city as directly as possible. It was doubtless on account of this nature of their occupancy that Congress gave such companies the large power authorized by said act. But the use necessary for a telephone company is of course far greater. It ramifies a whole city. It goes upon any street where it can get sufficient subscribers. The result is that a large portion of the streets of a city are invaded by the poles and wires of such a corporation. It does not merely pass through, but it permeates a city. If such a company should have given it the power conferred by said act of Congress upon telegraph companies, it would soon be beyond the control of the city authorities, even as to the designation of its routes. Is the company to be allowed to determine upon what and how many streets it will go? Whether it shall confine its lines to present needs, or by its extensions anticipate and prevent competition? Ought the possession of such a power to be recognized unless declared in " plain English words? "

We recognize the tendency of some of the highest courts to take what may be called a business view of questions of this kind, and that they seem to feel it their duty to lean strongly in their decisions towards the maintenance and encouragement of business enterprises. A conservative tendency in that direction is doubtless wise. But it would be far beyond the reach of conservatism for a court to hold

that an act, authorizing one class of corporations to enter upon and occupy in part the streets of a city *without its consent* (an invasion rarely ever authorized by a State) embraces another and different class of corporations unheard of at the time of the passage of the act. The Supreme Court of the United States has in its decisions delivered, since the case of *Pen. Tel.* vs. *West. Un. Tel. Co., supra*, shown a strong determination to uphold as far as possible municipal control, even over that class of corporations which are specified in said act. *(St. Louis* vs. *West. Un. Tel. Co., supra.)*

We submit that the said act as it now reads should not be construed to embrace telephone companies An examination of each of the significant words in the act will show that it was not intended to apply to any company, like a telephone company, confining itself originally, and in the main still, to some little locality, permeating with a web of wires the narrow limits of that locality, running wires from house to house, and to some central station, for the purpose of communication between the residents of that neighborhood. It authorized the passage "through and over" "the public domain," or "over and along" the "military or post roads of the United States." These words clearly indicate that Congress had in its thoughts some great instrumentality of interstate commerce then existing, and whose nature it was to pass "through and over" great areas of country. That it had in mind this idea of great distances is further seen from the fact, that when authorizing the pre-emption of public land for stations, the act restricts the location of such stations, so that they shall "not be within fifteen miles of each other." Does not such a limitation demonstrate that Congress was not providing for a telephone company?

The words "telegrams" and "rates" also clearly indicate what class of companies Congress had in mind at the passage of the act.

A fair way to look at this act is to treat it as an ordinary contract. It is a governmental contract, being the grant-

ing of a privilege upon certain terms. Treating it as a contract, let us see by means of an illustration the scope of those terms. "A," we will suppose, is on July 24, 1866, the owner of a large tract of land. On that day he makes a contract with "B" company, that it might for twenty years run its telegraph lines through and over said tract, as it might see fit, but upon certain terms, then agreed upon. During that twenty years the company begins to erect telephone lines up and down and across said tract, claiming that the words telegraph lines embraced telephone lines. "A" denies the company's right, insisting that he only contracted as to telegraph lines. Is there any doubt but that a court would necessarily adopt the construction contended for by "A"? Substantially the same question is presented by the record in this case.

In truth, we need not go out of the record for an illustration to show how erroneous is the construction of the act contended for by the appellee. On page 12 of the record it appears that the appellee on February 13, 1889, filed with the Postmaster-General its acceptance of said act. In that acceptance it described itself as the Southern Bell Telephone and Telegraph Company. Its acceptance of the offer contained in the act is as follows: "And the said company does especially agree that *telegrams* between the several departments of the government and their officers and agents shall at all times have priority over all other business in their transmission over the lines of said company, and the charges for such *telegrams* shall not exceed the rates annually fixed by the Postmaster-General."

Imagine that this litigation had never arisen, and the Postmaster-General should attempt, under that acceptance, to fix the charges for the use of telephones by the government, what would be the result, should the company deem it to its interest to deny the right of the Postmaster-General? The acceptance would be construed like the acceptance of any contract, viz: By the terms of the offer *as understood at the date of the offer*. At the time of the offer by the act

"telegrams" were well known and understood, and telephonic communication was an "unknown art." Would it not follow, then, by every respectable and recognized rule of construction, that the suggested claim of the Postmaster-General would have to be denied, and it be declared that the company had not assumed by its acceptance any such burden? Is it not also true that by its acceptance it only acquired privileges commensurate with its burdens. As the act does not bind it as to telephonic communications, neither can it be held to furnish any protection to the poles and lines used for such purposes.

That Congress intended that the rights granted under said act, as now found in the Revised Statutes, should be restricted as to the recipients of its benefits, can be seen from the fact that in section 5265, it prohibits any assignment of any right or privilege acquired thereunder.

The question is not what Congress might have done, but what it has done. It is possible that Congress might have given the same powers to a long-distance telephone company for its main lines had such a company existed on July 24, 1866. But it admits of doubt, whether Congress would at this day pass an act giving such a power to a long-distance telephone. However that may be, it is more than improbable that Congress would ever give such a power to a company as to its local wires, running from the central station to residences or business-houses; even if occasionally some of them may transmit a message to a telegraph station. Congress would consider and be guided by the main object and the general result, not the incidental use and minor effect.

We admit that a few decisions can be found construing the words "telegraph companies" to include in its meaning telephone companies. But it will be found upon examination of the cases that the decisions are based upon the phraseology of the respective statutes which were under discussion. However that may be, we insist that in the light of the decision of this court in the "Telegraph cases," *supra*,

no act of Congress, passed prior to the issuance of the Bell patent, in 1876, can be construed as embracing telephone companies under the term "telegraph companies." An act of Congress like the one under discussion should never be construed like a provision of the Constitution may be construed: as being a creation or reservation of a governmental power, and, therefore, not intended to be restricted by details, or to certain instrumentalities. A statute giving a franchise is not a reservation, but a surrender of sovereignty, and is, therefore, to be construed strictly.

The leading case relied upon by the appellee is *Attorney-General* vs. *Edison Tel. Co.*, L. R., 6, Q. B., Div., 244. This case was the first one to put such a construction upon those words. It has been in some instances blindly followed. The courts have ignored the fact that the decision turned, not upon what the words meant in their ordinary acceptation, but upon what they meant *as used in and defined by the English statutes.* In its decision in that case the court went into a detailed discussion of the words of the English statutes. It laid stress on the fact that the English act of 1863 defined a "telegraph" to mean "a wire or wires used for the purpose of telegraphic communication," and that the act of 1869 broadened the meaning still more by declaring that in addition to its meaning under the act of 1863, it should also mean "any apparatus for transmitting messages or other communications by means of electric signals." The decision of the court evidently rested upon the manifest purpose of Parliament apparent upon the face of the act to make the words as broad in their meaning as possible. And it should be remembered that the English act was not, like the act of Congress, one by which a corporation was greatly freed from "legislative governmental control," but was one by which the government declared its purpose to retain very great control over the telegraph. The former was a declaration for the retention of power, the latter a declaration of surrender of sovereignty. Surely the rules of construction must be different where the purposes are so dif-

ferent. Yet this is the decision, which several courts have followed, as if it construed the words of the English act by their general acceptation, instead by the definition set forth in the act itself.

The next case is that of the *Wisconsin Tel. Co.* vs. *Oshkosh*, 62, Wis., page 32. In that case the court, after noticing the English case just commented on, said: "If there remains any doubt as to the power given to charter a telegraph company being sufficiently broad to include a telephone company, then it must be dispelled by the general clause above quoted from section 1771, to-wit, 'for any lawful business or purpose whatever,' &c., for by a well-settled rule of construction these general words extend to things of a kindred nature to those specifically authorized by the section, and hence whatever is of a kindred nature to telegraphing, which most certainly include telephoning." Can it be said that that decision was based upon a construction of the words "telegraph company," or upon the words "for any lawful business or purpose whatever?" Certain it is, that the decision should have been put upon the latter ground, and any assertion that the words telegraph company included a telephone company, was virtually an *obiter dictum.*

In the case of *Cum. Tel. and Tel. Co.* vs. *United States*, 42 Fed. Rept., 273, the statement of the facts show that the company derived its rights from an ordinance of the city of Nashville recognizing it as a telephone company.

In the case of *Duke* vs. *Cen. N. J. Tel. Co.*, 53 N. Jer. Law., pp. 341-5, the court in discussing the New Jersey act, said:

"Telegraph acts do not define the kind of business in which the corporation shall engage, apart from the provision that the corporators shall subscribe stock for the construction of a telegraph line. The name of stock corporation need not indicate the business proposed to be transacted. Any title can be adapted. The only limitation

upon the scope of the business is that it must be within that for which a line of telegraph, in performing its public functions, is used."

It cannot be disputed that if the court construed aright the New Jersey statute, there was no necessity for that court to attempt to prove that the words "telegraph company" in their general acceptation include a telephone company.

The remaining case cited by the complainant is that of the *Ches. and Po. Tel. Co.* vs. *Balt. and Ohio Tel. Co.*, 66 Md., 399. We simply ask the Court to read what the Court says on page 410. It there appears that the Maryland statute called for no effort to enlarge the words "telegraph company."

Such are the authorities offered as reasons why this Court should construe the act of Congress to embrace telephone companies. Each one of them turning upon the peculiar phraseology of the statute then under discusssion. Not one of them throws any light upon the intent of Congress nor upon the terms used in said act of Congress. That act must be construed by three simple rules.

1st. The terms used are to be read according to their "general acceptation;" there being no word of uncertain meaning used.

2d. By the object in the mind of the law-maker at the time of its passage.

3d. By the inconveniences that would arise by construing the words to embrace telephone companies.

We have attempted to show, that tested by any one or all of these rules, the strained construction put by the appellee upon the act is unwarranted, and we submit that the Circuit Court erred in decreeing that the company was, "in accordance with the terms and provisions under the protection of the act of Congress of the United States, ap-

proved July 24, 1866, entitled to the injunction set forth in the decree complained of," and also that the Court of Appeals erred in affirming that decision.

II.

SCOPE OF THE COMPANY.

Even if telephone companies, doing interstate business or commerce, are embraced in the terms of said act, yet the question still remains whether the Richmond Exchange is of that character—is *its* business of the nature of interstate commerce?

In discussing this latter question we must notice it in two aspects:

1st. As to the messages sent and received in connection with the Western Union Telegraph Company to and from points outside of the State.

2d. As to those messages which never go beyond the limits of the city, or State.

The character of the first stated class of messages is accurately described in "Bell Ex. No. 15," on page 70, to which we have previously alluded. That exhibit shows that the message is not transmitted from the telephone wires to the telegraph lines, nor *vice versa*. In one class of messages, which are to be sent beyond the State, the clerk at the 'phone in the office of the telegraph company receives the message through the 'phone, *puts it in writing and hands it to the operator of the Western Union Telegraph Company*. In the other class of messages, which are received from beyond the State, "the Western Union Telegraph operator who receives the message, *puts it in writing and hands it to the 'phone clerk of the company*, who has charge of one of the 'phones in its office in Richmond, who *calls up*

the person to whom the message is addressed over the 'phone, and delivers it to him through the 'phone. This method of delivering and receiving was done up to November 1, 1896, under the contract set forth in "Bell Ex. No. 4." By contract, the clerk at the 'phone in the Western Union telegraph office is, when receiving and delivering messages over the telephone, the agent of the telephone company; "subject to its rules and regulations." (See page 53, subdiv. 4.) As that contract expired on that day, that course has been pursued since that day by silent understanding, without any contract. The company does not allege in its pleadings, nor prove by its evidence, that the Richmond Exchange does any interstate commerce unless through the Western Union Telegraph Company.

The question is, whether these messages, before they are delivered by the agent of the telephone company to the Western Union telegraph operator, have begun so to move as to become of the nature of interstate commerce. While the message is being spoken it is still under the control of the speaker. It has not even left his possession. It is more subject to his dominion than is a barrel of flour or a bar or iron, when being put upon a dray to be carried to a railroad depot. Until completely spoken, it is still in the process of delivery. Is the inconceivable moment of time to be computed between the speaking into the receiver and the hearing at the transmitter. But admit that that moment of time is to be considered, yet has the movement become that of interstate commerce. Suppose that the dray, which we have used for illustration, has upon it the article of merchandise, and is on its way to the depot, will the movement have thereby become that of interstate commerce? We submit it will not. Or, suppose that it has reached the depot, but has not been delivered, will it have become of the nature of interstate commerce? If so, at what point was the change brought about? Was it when in sight of the depot, or after it was backed up to the receiving door? We insist that at neither time was any such change wrought. That

great constitutional privilege does not depend upon any such indefinite and shifting conditions. That principle only comes into play when the article or object of transportation has been committed to a common carrier for transportation to some other State; and the point of its beginning is not, where it has been given to some person or local carrier to be delivered to some other carrier in the same locality, which alone, or in customary connection with others, transports such articles or objects into another State. So, here the reception of the message by the 'phone clerk is but the reception by the telephone company, and it does not come into the possession of the telegraph company, until written out by the 'phone clerk, and delivered to the operator of the Western Union Telegraph Company.

In *Coe* vs. *Errol*, 116 U. S., 517-528, the Supreme Court had before it, and decided, when the movement of an article becomes interstate commerce. It said:

"'Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the State has begun.' But this movement does not begin until the articles have been shipped or started for transportation from one State to the other. The carrying them in carts or other vehicles, or even floating them to the depot where the journey is to commence is no part of that journey. That is all preliminary work performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another State, or committed to a common carrier for transportation to such State, its destination is not fixed and certain. It may be sold or otherwise disposed of within the State, or never put in course of transportation out of the State. Carrying it from the farm or the forest to the depot is only an interior movement of the property entirely within the State for the purpose, it is true, but only for the purpose of putting it into a course of exportation; it is no part of the exportation itself. Until ship-

ped or started on its final journey out of the State its exportation is a matter altogether *in fieri*, and not at all a fixed and certain thing."

A similar distinction was drawn by this court in *Hopkins* vs. *United States*, decided October 24, 1898. In the former case this court held that the instrument or facility used for starting an article upon a course of interstate transportation was not an instrumentality of interstate commerce. In the latter case it held that the instrument, or facility, used for receiving and disposing of an article which had been in such a course was not an instrumentality of interstate commerce. In the latter case it used these words: "The selling of an article at its destination, which has been sent from another State, while it may be regarded as an interstate sale, and one which the importer was entitled to make, yet the services of the individual employed at the place where the article is sold are not so connected with the subject sold as to make them a portion of interstate commerce. * *

Granting that the cattle themselves, becausing coming from another State, are articles of interstate commerce, yet it does not follow that before their sale all persons performing services in any way connected with them are themselves engaged in that commerce. * * * The commission agent, in selling the cattle for their owner, simply aids him in finding a market; but the facilities thus afforded the owner by the agent are not of such a nature as to thereby make that agent an individual engaged in interstate commerce." * * *

This is the rule where the question is as to the power of taxing property belonging to the instrumentality claiming the protection of the constitutional provision. Ought not this rule to be still more guarded, when applied not to mere taxation of property but brought to bear upon the right and duty of local governments to protect their highways, which the claimant proposes to take and permanently occupy to the *pro-tanto* exclusion of the general public? In the former case the question is merely as to the exercise of a

power, while in the latter it is as to the right to protect property from invasion and seizure.

In the lower court the appellee relied upon the line of cases beginning with "Daniel Ball," 10 Wal., 557, and ending with *Railroad Co.* vs. *Penn.*, 136 U. S., 114. But we submit that none of those cases controvert the case of *Coe* vs. *Errol, supra.* In fact, in the opinion in the latter case the Daniel Ball case is referred to and distinguished. The principle recognized in the Daniel Ball case and the subsequent cases, ending with *Railroad Co.* vs. *Penna.*, 136 U. S., 114, is that an instrumentality of commerce, *not municipal or local in its nature and general business,* may become an instrumentality of interstate commerce by its business, although itself working entirely within the limits of one State. Justice Lamar in the last-mentioned case called attention to the fact that the railroad in that case was a link in a "through line."

In *Hopkins* vs. *United States, supra,* this court noticed this line of decisions, and pointed out the clear distinction existing in those cases. It used these words: "But in all the cases which have come to this court there is not one which has denied the distinction between a regulation which directly affects and embarrasses interstate trade or commerce, and one which is nothing more than a charge for a local facility provided for the transaction of such commerce." Here the distinction is still broader. Here the "local facility" is not "provided for the transaction of *such* commerce." It was provided for local use—and in its general use is still so confined.

The case of *Coe* vs. *Errol* was dealing with merely local or municipal instruments of commerce, such as "carts or other vehicles, or even floating them to the depot." That case was cited with approval in *Kidd* vs. *Pearson*, 128 U. S., 1-24, and was also recognized as correct in *Lehigh Valley Rd.* vs. *Penna.*, 145 U. S., 192. We also ask consideration of the last-mentioned case, as showing that this court is not

inclined to push the doctrine of interstate commerce beyond what necessity demands.

We submit that the appellee comes within the principle of *Coe* vs. *Errol*. It is local and municipal in its nature. It does not, nor does it pretend to, partake of the nature of a long-distance telephone. It no more partakes of the nature of an instrument of interstate commerce than would a street-car, whose owner had agreed with a through line of railroads to haul its passengers from one depot to another at a stipulated price. Neither the hackman who drives one to the depot, nor the driver of the wagon which carries one's trunk to the same place is engaged in interstate commerce. The street car, the hack, and the wagon would each in some remote way aid interstate commerce—but a court would not regard such incidental possibilities. Each would be regarded as "a local facility." It would hold that its true, its real business was local, and not affected by the interstate commerce clause of the Constitution.

So the appellee is not an instrumentality of interstate commerce, but, like the hack, the wagon, or the street car, it is only an *intermediary* between the consignor and the required instrumentality of interstate commerce. It does not even partake of the public service like the above-named vehicles. Each telephone wire only renders service to a limited few at the most. Some of them only render service to a single subscriber. In this respect there is a marked difference between telegraph and telephone lines. The former is open to the public in general, the latter limits its services, as above stated.

Such we submit is the nature and business of the Richmond Exchange of the Southern Bell Telephone and Telegraph Company. The telephone lines are not a link between other lines running into the State on the one hand, and running out of it on the other. They are a mere local vehicle to carry the messages to the office of the common carrier of messages, by whom alone it is "actually launched on its way to another State." Carrying them from the tele-

phone subscriber or patron to the telegraph office " is only an interior movement of the property entirely within the State for the purpose, it is true, but only for the purpose of putting it into a course of exportation; it is no part of the exportation itself."

We submit that the company cannot be regarded as doing an interstate commerce business even as to the messages which it delivers to or receives from the Western Union Telegraph Company.

Passing to those messages, which are admittedly *infra* State commerce—messages, most of which never leave the corporate limits of the city, and none of which ever go beyond the limits of the State; is it not still more certain that the Circuit Court erred in entering said decree; " the Court intending by said injunction to enjoin the city from interfering with the *local* business and messages as well as those of an interstate character." It is hard to understand upon what principle the Circuit Court based its decree so far as it applies to what the Court itself recognized as " local business and messages." Yet the Court of Appeals affirmed that error. As was said in the case of the State Freight Tax, 15, Wal., 232-277, and quoted in *Fargo* vs. *Michigan*, 121 U. S., 230-241: " Doubtless a State may regulate its internal commerce as it pleases."

In *Wabash Rly. Co.* vs. *Illinois*, 118 U. S., 557, the same principle was more fully announced. Said the Court: " The charges for these might be within the competency of the Illinois Legislature to regulate. The reason for this is that both the charge and the actual transportation in such cases are exclusively confined to the limits of the territory of the State, and is not commerce among the States or interstate commerce, but is exclusively commerce within the State. So far, therefore, as this class of transportation, as an element of commerce is affected by the statute under consideration, it is not subject to the constitutional provision concerning commerce among the States. It has often been held in this court, and there can be no doubt about it, that there is a

commerce wholly within the State, which is not subject to the constitutional provision," &c. (See also *Dow.* vs. *Beidleman*, 125 U. S., 680; *Geo. Bank Co.* vs. *Smith*, 128 U. S., 174-179.)

The Supreme Court of the United States has been called upon several times to recognize this power of a State, even as to telegraph companies, claiming the same protection under the same act of Congress that the complainant company here claims. In *Telegraph Co.* vs. *Texas*, 105 U. S., 460-66, it said:

"It follows that the judgment, so far as it includes the tax on messages sent out of the State, or for the government on public business, is erroneous. The rule that the regulation of commerce which is confined exclusively within the jurisdiction and territory of a State, and does not affect other nations or States or the Indian tribes, that is to say, the purely internal commerce of a State belongs exclusively to the State, is as well settled as that the regulation of commerce which does affect other nations or States or the Indian tribes, belongs to Congress. Any tax, therefore, which the State may put on messages sent by private parties, and not by the agents of the government of the United States, from one place to another exclusively within its own jurisdiction will not be repugnant to the Constitution of the United States. Whether the law of Texas in its present form can be used to enforce the collection of such a tax is a question entirely within the jurisdiction of the courts of the State, and as to which we have no power of review." (See also *West. Un. Tel. Co.* vs. *Pendleton*, 122 U. S., 247-257; *West. Un. Tel. Co.* vs. *Massachusetts*, 125 U. S., 530-548; *West. Un. Tel. Co.* vs. *Penna.*, 128 U. S., 39-40. Such being the law as to telegraph companies, which are mentioned by name in the act, why should it not be the law as to telephone companies also? It was upon this point that Brawley, Judge, dissented in the Circuit Court of Appeals, withholding his assent from "so much of the opinion as holds that a tele-

phone company, such as is described in this case, and whose business is local in character, is within the purview of the act of Congress of July 14, 1866."

Again we submit that the Circuit Court erred in its decree when it declared that the complainant company was protected by said act of Congress even as to its "local business and messages," and that the Court of Appeals erred in affirming such a decree.

III.

POSTAL SERVICE.

We come next to the position taken by the appellee in the lower courts, that the business and lines of the company "constitute a part of the postal service of the United States." It is claimed by the company that if it forms a part of that service, then it is protected from interference, even as to local messages. No authority can be found in support of such a position. It cannot be tenable. If it were, then no State would have any power to put restrictions or regulations upon any railroad within its borders, although not engaged in any way in interstate commerce. We know, however, from every respectable decision that States do possess such power. Yet a railroad actually carries the United States mail. No case decided by the Supreme Court puts the constitutionality of the act upon the ground that the telegraph forms a part of the postal service. Every decision of that court construing said act of Congress finds the power of Congress to enact such a statute in the clause of the Constitution of the United States as to interstate commerce. In the quotation above made from the decision in *Telegraph Co.* vs. *Texas, supra*, the court holds that while the company will be protected from State interference as to

messages sent "by the agents of the government of the United States," yet it can put "any tax" it may choose "on messages sent by private parties, &c., from one place to another exclusively within its own jurisdiction."

That decision, and the several others affirming it, show that the fact that the officials of the government of the United States use the company's lines on official business, only protects the company as to the messages sent by such officials. Such being the law as to telegraph companies, we can imagine no reason why the protection afforded telephone companies should not at least be as limited.

But neither telegraph nor telephone companies form a part of the postal service—for those words only embrace the instruments of transmission and the transmission itself of information by the government. It has never been applied to the instruments owned, maintained, and operated by individuals or corporations for the purpose of private gain. It is true, that the government may use a 'phone for its own use, but that makes it no part of the postal service. The government may need and may have electric lights in its post-offices and other government buildings, but that would not bring electric-light companies under any clause of the Constitution. If the government operated telegraph and telephone plants and transmitted messages for the public, it would then become a part of the postal system. But at present it is only an individual, not a governmental undertaking or instrumentality. The government has no connection with any telephone company, and merely hires any needed 'phones like any other subscriber. (See record, page 74, sub-div. 3.)

IV.

UNDER ORDINANCE, NOT ACT.

The next ground upon which we insist that the said decree is erroneous is, that even if the entire business of the company would have been within the scope of said act, had its lines been established after it had accepted the terms of said act, and constructed under its protection, yet having been constructed and established under the contract contained in said ordinance of June 26, 1884, it cannot now refuse to comply with the terms of said contract. The company claims that it is released from all the obligations of said contract entered into on June 26, 1884, by reason of its acceptance of said act of Congress on February 13, 1889—a voluntarily delayed acceptance. In other words, it claims that having exercised its alleged option to enter upon and occupy the streets of said city, either under said act of Congress or under said contract ordinance of the city, and having selected to enter, and having entered under the terms of said ordinance, it can, when it sees fit, plead its subsequent acceptance of said act as a protection against and a nullification of the terms of said contract ordinance, voluntarily sought for and accepted by it.

Surely the complainant was not obliged to proceed under the power given by the said act, and force all necessary routes from the city of Richmond. It had ample power to enter into a contract with said city as to the use of its streets, and to use them under and subject to said contract. We cannot think that this can be disputed. If proof of it be needed, the compiainant's bill and exhibits furnish it. The complainant entered upon the streets of said city in 1884 under the terms and conditions of the ordinance of June 26, 1884. Yet the complainant admits that it never accepted the terms of the act of Congress until February 13, 1889. No one will pretend that the act ever applied to the com-

plainant before its acceptance of it was filed. Under what then was the complainant acting in the meantime? Only under the terms and conditions of the contract contained in said ordinance. What then was the effect of the acceptance of said act? Did it destroy the obligation of a contract? We admit, that in a proper case, "It is no answer to this to say that it interferes with the validity of contracts, for no provision of the Constitution prohibits Congress from doing this as it does the States," &c. (*Mitchell* vs. *Clark*, 110 U. S., 633-643.) But we submit that no such intention should be *inferred* of Congress. That before such a construction should be put upon an act, the intention of Congress should be most manifest. At least judicially, Congress is not to be *presumed* to intend a wrong.

Can it be pretended that the act of Congress forbids and prohibits any telegraph company, after accepting it, from making with a city for the use of its streets any kind of contract which might deem desirable? Such a pretention would make Congress a coddling nurse instead of a governmental shield. The power given by the act is simply a "permissive" one, not affecting in any way the company's former and corporate powers. (*West. Un. Tel. Co.* vs. *Mass.*, 125 U. S., 530-547, and 141 U. S., on page 44.) But if it be admitted that Congress did not intend to prohibit such contracts, then surely it cannot be earnestly claimed that Congress intended to destroy the obligation of such a contract entered into prior to the acceptance. It is far more probable that Congress would prohibit the making of such a contract, than that it would legalize a breach of it, after it had been made.

It is no argument against the contract, that, if the company had at first come in under the act of Congress, no provision would or could have been inserted as to a repeal. A party to a contract can voluntarily bind himself to terms more disadvantageous than the law would impose. "What a State may do is one thing, and what parties may contract voluntarily to do among themselves is quite another thing."

(*Hopkins* vs. *United States*, decided by this court October 24, 1898. Also, *Pierce* vs. *Somerset Ry.*, decided October 31, 1898.)

This court has decided that an instrumentality of interstate commerce may voluntarily bind itself to a State which it enters, with obligations, which the principles of law, applicable to interstate commerce, would not allow a State to impose, after the instrumentality had entered the State.

"The charter of the Baltimore and Ohio Railroad Company for constructing and working a branch railroad between Baltimore and Washington contained a stipulation that the company at the end of every six months should pay to the State one-fifth of the whole amount received for the transportation of passengers." The obligation was held binding. (*Railroad Company* vs. *Maryland*, 21 Wal., 456.) In its opinion the Court said:

"What amounts to a regulation of commerce between the State, or to a discrimination against the citizens of other States? This is often difficult to determine. In view, however, of the very plenary powers which a State has always been conceded to have over its own territory, its highways, its franchises, and its corporations, we cannot regard the stipulations in question as amounting to either of these unconstitutional acts."

In *Ashley* vs. *Ryan*, 153 U. S., page 436, a similar question arose, where the court approved the case of *Railroad Co.* vs. *Maryland*, and held that "a State, in permitting a foreign corporation to become one of the constituent elements of a consolidated corporation, organized under its laws, may impose such conditions as it deems proper, and the acceptance of the franchise implies a submission to the conditions, without which the franchise could not have been obtained." The court says on page 441:

"As it was within the discretion of the State to with-

hold or grant the privilege of exercising corporate existence, it was, as a necessary resultant, also within its power to impose whatever condition it might deem fit as prerequisite to corporate life. The act of filing, constituting, as it did, a claim of a right to the franchise granted by the State law, carried with it a voluntary assumption of any burden with which the privilege was accompanied, and without which the right of corporate existence could not have been procured. We say voluntary assumption, because, as the claim to the franchise was voluntary, the assumption of the privilege which resulted from it partook necessarily of the nature of the claim for corporate existence. Having thus accepted the act of grace of the State and taken the advantages which sprang from it, the company cannot be permitted to hold on to the privilege or right granted, and at the same time repudiate the condition by the performance of which it could alone obtain the privilege which it sought."

Could any language be more applicable to this case? In 1884 the company, not having attempted by an acceptance to bring itself within the benefits of the act of Congress, accepted the terms of the city ordinance. It said by its ordinance of 1884 you can come in on certain terms. The company accepted those terms. We submit that the Supreme Court spoke simply honest words when it said that a company should not be "permitted to hold on to the privilege or right granted, and at the same time repudiate the condition by the performance of which it could alone obtain the privilege which it sought."

But the appellee claimed in the lower courts, that even if, prior to the repeal ordinance of 1894, it held its rights upon the streets of the city under the franchise ordinance of June, 1884, yet that, since the passage of the repeal ordinance, it had the right to remain upon said streets under the act of Congress, because it had been accepted by the appellee before such repeal. It contended that having had the right to enter under that act, it has the right to remain.

We submit that that contention is contradicted both by the object, as well as the language, of the act.

The object of the act was to encourage the extension of the lines of companies then "organized," or the construction, maintenance, and operation of lines by companies, "which may hereafter be organized." Those purposes, and those purposes only, are declared in the act. There is a total absence of any words suggesting any purpose to extend its privileges to any then existing line. It is not an act of ratification, but of authorization. It nowhere intimates any intention to be retroactive. Its view, its scope, its face, was turned entirely to the future. It nowhere suggests that any line then upon the public domain, or upon a highway, being a post route, might be brought under the privilege of the act, regardless of the fact that it might be on the public domain under a special contract of rental with the National Government, or on a highway under a specific agreement with a State or municipal government. They were supposed to stand under the *ægis* of their respective franchises or contract rights. It only offered its mantle of protection to those lines which it might induce any person or corporation to construct. A simple illustration will show that this is the proper interpretation of the act:

Let it be supposed that previous to the passage of the act a telegraph company had been allowed, under a written contract with the National Government, to erect a station upon certain unappropriated public land. After the passage of the act the contract expires. Before the expiration of the contract Congress passes an act declaring that upon the land so used there shall be erected a post-office or other public building. Before the expiration of the contract the company files with the Postmaster-General its acceptance of the act here under dispute. Could the company, under such circumstances, claim a right to *remain* on the land, because of its acceptance of said act? We submit that the courts would deny such a claim, and hold that the act must be strictly construed, and that it only applied to lines which

might be erected because of the inducements of the act, and after its acceptance.

One of the conditions of the act reads as follows: "Section 5628.—*Before* any telegraph company shall *exercise* any of the powers or privileges conferred by law such company shall file their written acceptance with the Postmaster-General of the restrictions and obligations required by law."

This shows that it was intended by the act that the required acceptance should precede the construction of the lines. This requirement was but reasonable and to be expected. Surely the act never intended to authorize a company to enter upon the public domain, run its lines, and build its stations, and then accept the terms of the act. On the contrary, it very properly said, before you take to yourself public property, you must agree to tender the compensation required in the act. It was equally as reasonable to make this acceptance, a condition precedent as to the use of highways as well as to the occupancy of the public lands. This requirement was in consonance with what we have asserted was the object of the act, and what is declared in the title of the act, viz: "To aid in the *construction* of telegraph lines." (U. S. Stat's at Large, Vol. 14, page 221.)

If we are right in our contention, that a company, which had before the passage of the act entered upon the public domain under a special contract, could not remain thereon after the expiration of said contract by filing an acceptance of the act, then *a fortiori*, a company, which after the passage of the act ignored the offer of the act, and selected to construct its lines upon public property under a special contract, could not, by a subsequent acceptance of the act, remain thereon after the expiration of the contract. The former company would have had before entering under its contract no opportunity to accept the act, while the latter would, by its conduct, have declined the offer of the act, and would have deliberately expressed its preference for an existence under a special contract.

Can it be successfully contended that the act, after de-

claring upon its face in express terms, that the acceptance of it must be "before" the exercise of any privilege under it, should be construed to authorize a company, first, to reject its terms and to build its lines upon public property under a special contract, and then, upon the expiration of the contract, claim a right to remain on such property, because it has in the meantime filed an acceptance of said act. Such a course of conduct has more the appearance of a fraud than the exercise of a statutory right. . The act was never intended to assist in the perpetration of a fraud. If it were, this court will refuse to adopt a construction which will enable the perpetration of such a fraud, when there is a simple, straightforward construction which will render justice to all.

We submit that even if the appellee could originally have come under the terms of the act, yet it attempted to do so too late to have any effect upon its contract with the appellant.

Whatever right the company may have had to demand and obtain from the city a right of way over and along its streets under said act of Congress, and free of any contract with the city, is a question that is outside of this controversy, as no such demand has ever been made. Certain it is, that the observance by the complainant of its contract will not prevent it from demanding a route under said act, if it comes within its scope. And we submit that it is equally certain that its right to demand a route under the said act, if it has any such right, cannot protect it from being made to abide by the terms of the contract ordinance of June 26, 1884. A right to *some* route does not entitle it to any particular route—especially one which it receives on certain terms and which it agreed to surrender on certain terms. Hence the city should not be enjoined from requiring the complainant to perform the terms of said ordinance, and remove its poles and wires if the repeal ordinance of December 14, 1894, is sufficiently broad in its terms, and is valid.

Nor has the city declared by its ordinances any desire to make the complainant remove its poles and

wires from the streets, other than those in which conduits are required. It is true that the city repealed the ordinance of June 26, 1884. There was no other way by which the city could get free of the privileges granted to the complainant. There was no other way by which the city could make the complainant come under any general ordinance applicable to all telephone companies within the city's limits. In order to keep the city from being overcrowded, the Council passed in July, 1891, an ordinance to require a joint use of poles. (See page 39.) The company refused to act under, or be bound by it. The city had no way by which she could require the appellee to act under it, until she had repealed the contract ordinance of June, 1884. But the city passed on September 10, 1895, an ordinance, a copy of which is filed with the bill as Exhibit "H," which would have protected the complainant as to its poles and wires, except in those streets in which conduits are required, had it seen fit to bring itself within the provisions of this last-mentioned ordinance. But it has refused to do so, because of its objection to the determination of the city to have in its streets as few poles for electrical purposes as possible, and to put light-current wires of different companies together, as far as possible, on the same poles, and heavy-current wires together on other poles. (See answer on page 37.) It cannot be denied that the effort of the city to limit, as far as possible, the number of poles encumbering its streets, is a reasonable and praiseworthy regulation of the use of the streets by electrical companies.

The above feature of the city's conduct in this matter appear in the exhibits filed with the bill, and show that the city was wise in contracting with the complainant for a repeal of the ordinance under which it has heretofore acted. We submit that the reservation of the power to repeal was within the power of the city to regulate the use of its streets, and even if it could not force a telephone company to accept a route under an ordinance containing such a reservation, yet having accepted a contract as to the use of the

city's streets with such a provision in it, such a contract is valid and binding on the complainant.

V.

EFFECT OF THE REPEAL.

We come next to notice the effect of the repeal ordinance of June 26, 1884. The company raises two contentions as to that ordinance.

1st. That the city had no power under the State statute to attach to the ordinance any provision for its repeal.

2d. That if it had such power, yet the repeal does not affect the routes already granted, and only prevents the granting of any new ones.

The basis of the complainant's claim that the city had no power to reserve the right to appeal, is that the State reserved the right to repeal any privilege given by the statute, and because the said statute only authorized any city to consent to the occupation and use of its streets, and did not expressly give any authority to a city to attach any conditions to its consent.

It is impossible to see how the reservation on the part of the State could destroy any right of the city to reserve the right to repeal. The statute shows that it was the intention of the State that the cities should not be disturbed without their respective consents. If it had proposed to ignore the wishes of the cities, and to have at all times its will alone the arbiter, it would have said so, instead of authorizing, so far as it could, the city to *absolutely refuse* to allow any telegraph or telephone company to occupy its streets. While it is true that the reservation on the part of the State applies to any such company, both, so far as it may be within or

without a city, yet it was never intended to take away a right, which was embraced in the right expressly given, viz., to absolutely refuse such companies any right to use its streets. The power of a city, under a clause of that character, to impose conditions, limitations, and restrictions is no longer an open question. It has already been recognized and determined by a decision, first, of the Supreme Court of this State, and then, in the same case, by a decision of the Supreme Court of the United States. (See *Rich., Fred. and Po. R. R. Co.* vs. *City of Richmond*, 26 Gratt., 83, and upon appeal, in 96 U. S., page 521.)

It appears in that case, that the statute of Virginia, authorizing the building of the Richmond, Fredericksburg and Potomac railroad, directed that books of subscription might be opened "for the purpose of making a railroad from some point within the corporation of Richmond, *to be approved by the Common Council*," &c., &c. Under that power the city of Richmond passed an ordinance approving a location asked for by the company, upon condition, "that the corporation of Richmond shall not be considered as hereby parting with any power or chartered privilege, not necessary to the said railroad company for constructing said railroad, and connecting the same with the depot of said company within the limits of the city."

The route of the road ran on Broad street from the western limit to about the centre of the city for about a mile, and on that route the company hauled its cars by steam for about forty years. Then the City Council passed an ordinance forbidding the propelling of cars *by steam* on the said route on Broad street. This last ordinance was upheld by both the Supreme Court of Virginia and the Supreme Court of the United States. In the opinion of the latter court, it is said:

"The power to approve certainly implies the power to reject one location, &c., and this *necessarily carries with it the further power to reserve such governmental control over the*

company in respect to the road, when built," &c. * * * "This the city was willing to do, upon condition that it should not be considered as thereby parting with any power or chartered privilege, not necessary to the company, for constructing its road or connecting it with the depot. The terms were proposed to the company and accepted. * * * By the conditions imposed, these powers were all reserved, except to the extent of permitting the company to construct its roads upon the route designated, and connect it with the depot. All the usual and ordinary powers of the city government over the road when constructed, and over the company in respect to its use, were expressly retained. The company, therefore, occupied Broad street upon the same terms and conditions it would, if the charter had located the route of the road within the city, but in terms subjected the company to the government in respect to the use of the road when constructed."

This case shows that where the authority to grant a franchise is given, that power embraces the lesser power, to attach appropriate conditions and terms to the grant.

We submit that the claim that the city had no power to reserve the right to repeal the ordinance of June 26, 1884, is without merit.

It now remains to see what is the effect and the extent of the repeal. The complainant contends that it had no effect upon the poles and wires already erected and in use, and, if of any effect, could only revoke the power given the Committee on Streets to grant any new or additional route. The city insists that its effect was to repeal the ordinance of June 26, 1884, *in toto*, and revoke absolutely every right and privilege obtained or exercised by the complainant thereunder.

The language of the section reserving the right of repeal is as follows:

"This ordinance may at any time be repealed by the Council of the city of Richmond; such repeal to take effect

twelve months after the ordinance or resolution repealing it becomes a law." Such language admits of no doubt as to what was to be repealed. "This ordinance"—the creation and embodiment of the franchise in all its parts—the life of every privilege therein brought into being—was, what might "at any time be repealed." It did not provide for the repealing of some provision or part of the ordinance. It did not limit the repeal to a revocation of the power given to the Committee on Streets. It declared that the ordinance in its entire scope and effect—"*this ordinance* may at any time be repealed." It embraced in such terms the declaration that every right and privilege, created by the ordinance, could be revoked and obliterated. Such rights and privileges could only exist by reason of the existence of said ordinance. When one ceased to exist, the others also expired.

The subsequent provision, that "such repeal to take effect twelve months" after the repeal ordinance became a law, clearly shows what was meant to be the effect of the repeal ordinance. It surely did not mean that after passage of such repeal the Committee on Streets could continue for twelve months to grant new routes. Yet such is the effect of the construction put by the complainant upon the terms reserving the right to repeal. If, as the complainant contends, the effect of a repeal was merely to prevent the Committee on Streets from granting new routes, then, as the repeal was not to take effect for twelve months, the committee could continue from that time to grant new routes. And if such new routes were also to be beyond reach of the repeal, then the repeal would be virtually useless if the committee should see fit during those twelve months to be very liberal in its granting of new routes. Such a construction, although it is the one for which the complainant contends, is too strained and unreasonable for it to be accepted.

In *Greenwood* vs. *Freight Co.*, 105 U. S., 13, it appears that the Legislature of Massachusetts had by statute created a street railroad company. At the time of the passage of

that special statute there existed also a general statute, reserving the right to amend, alter, or repeal, at the pleasure of the Legislature, every act of incorporation passed by it. The Legislature repealed the special statute, and the question arose, as to what was the effect of that repeal. The Supreme Court held:

"Such an act may be amended; that is, it may be changed by additions to its terms or by qualifications of the same. It may be altered by the same power, and it may be repealed. What is it may be repealed? Is it the act of incorporation? Is it the organic law on which the corporate existence of the company depends which may be repealed, so that it shall cease to be a law; or the Legislature may adopt the milder course of amending the law, &c., &c. All this may be done at the pleasure of the Legislature. That body need give no reason for its action in the matter. The validity of such action does not depend on the necessity for it, or on the soundness of the reasons which prompted it," &c., &c.

And again on pages 18 and 19 it says:

"One obvious effect of the repeal of the statute is that it no longer exists. Its life is at end. * * * If the essence of the grant of the charter be to operate a railroad, and to use the streets of the city for that purpose, it can no longer so use the streets of the city, and no longer exercise the franchise of running a railroad in the city. In short, whatever power is dependent solely upon the grant of the charter, and which could not be exercised by unincorporated private persons under the general laws of the State, is abrogated by the repeal of the law which granted these special rights."

We submit that the above authority is conclusive, and that the repeal revokes any right to continue in use its poles and wires which the complainant may have erected and strung prior to such repeal.

VI.

MUNICIPAL CONTROL.

But even if the complainant's business were interstate commerce, and the complainant were embraced in the terms of the said act of Congress, and the repeal ordinance were ineffective, yet the company would by no means be as free of municipal control as it claims to be in its bill of complaint, and declared in the decree complained of. The bill alleges that the company "under the act of Congress, &c., was and is entitled to maintain and operate its lines through and over the streets and alleys of the city of Richmond, with regard to the consent of the said city," &c. (page 5), and later in its bill of complaint, it alleges in substance that the value of its property is being injured by the passage and threatened enforcement of the two ordinances approved September 10, 1895; copies of which were filed with the bill as exhibits. The prayer of the bill asks "that the ordinances of said city of the 14th of December, 1894, and of the 10th of September, 1895, so far as they undertake to prevent your orator from maintaining and using its lines, poles, and wires over and along the streets and alleys of the city of Richmond from repairing, renewing, and extending its said poles, wires, lines, and routes as its business may require may be declared null and void." The decree declares the right of the company "to put up, renew, replace, and repair its lines, poles and wires" over and along the streets and alleys of the city of Richmond, both those now occupied by the complainant company and those not now so occupied, and enjoined the city "from preventing or interfering with the exercise of the aforesaid rights by the complainant company."

By the eleventh assignment of error the attention of the Circuit Court of Appeals was called to the fact that the said decree was erroneous "because it gives the complainant an

unrestricted right to erect poles anywhere in said city without being subject to the ordinance of the city approved September 10, 1895, filed as Exhibit 'G' with the bill of complaint, or any of its provisions, or any other regulation which may be hereafter ordered by the city authorities." Although the attention of the lower court was called to that error, it remained unchanged, and the city's hands were tied even as to imposing any reasonable regulation. And yet there cannot be any doubt as to the right of the city in that respect. The Supreme Court of the United States has been called upon on more than one occasion to say whether under said act telegraph companies were free from State and municipal control. In *West. Un. Tel. Co.* vs. *Mass.*, 125 U. S., 530-548, it is held that:

"It never could have been intended by the Congress of the United States, in conferring upon a corporation of one State the authority to enter the territory of any other State and erect its poles and lines therein, to establish the proposition that such company owed *no obedience to the laws of the State* into which it thus entered, and was under no obligation to pay its fair proposition of the taxes necessary to its support."

In *St. Louis* vs. *West. Un. Tel. Co.*, 148 U. S., 92-100, the court said:

"It is a misconception, however, to suppose that the franchise or privilege granted by the act of 1866 carries with it the unrestricted right to appropriate the public property of a State. It is like any other franchise to be exercised in subordination to public as well as to private rights."

And on page — it says:

"If it is, as these held (*West. Un. Tel. Co.* vs. *Mass.*, 125 U. S.,) simply a permissive statute, and nothing in it which

implies that the permission to extend its lines along roads, not built or owned by the United States, carries with it any exemption from the ordinary burdens of taxation, it may *also* be affirmed that it carries with it no exemption *from the ordinary burdens* which may be cast upon those who would appropriate to their exclusive use any portion of the public highways."

This latter case came again before the court upon a petition for a rehearing (149 U. S., 465.) In its decision upon said petition, the court said:

"If the city gives a right to the use of the streets or public grounds, as it did by Ordinance No. 11,604, it simply regulates the use when it prescribes the terms and conditions upon which they shall be used."

And on pages 471-472 it says:

"The determination of the amount to be paid for the use is as much a matter of regulation as determining the place which may be used or the size or height of the poles. * * * But if the city had power to contract with defendant for the use of the streets, it was because it had control over that use. If it can sell the use for a consideration, it can require payment of a consideration for the use; and when counsel say that no question can be made as to the validity of such a contract, do they not concede that the city had such control over the use of the streets as enables it to demand pay therefor?"

See also *Missouri* vs. *Murphy, et al.*, 170 U. S. 78.

The above authorities clearly establish that the telegraph company, which occupies the streets of a city, is subject to all reasonable regulations which the municipality may impose.

It follows that if the said ordinances, filed as Exhibits "G" and "H," contain reasonable regulations, then the lower court should at least have modified its injunction to the extent of requiring the company to conform to such of said regulations as the lower court might deem it to be reasonable. It is within the province of a court of chancery in granting an injunction to impose conditions upon the complainant. Hence, even if the court had power to grant any injunction in this case, it should have only done so upon such conditions set forth in said two ordinances as are reasonable regulations. In looking to see which of the requirements are reasonable, they must be considered as of the time when the complainant refused to proceed or act under them. If the complainant, by his failure to conform, has allowed new circumstances to arise, which would make his compliance now with the said requirements considerably more burdensome, it is his own fault, and the reasonableness of the requirements is not lessened or affected. The complainant would have no one but himself to blame, and could not, because of his own wrong conduct, be relieved from performing acts reasonable when required.

It is true that the Circuit Court of Appeals held that the decision of the Circuit was erroneous in that it did not recognize the right of the city to impose reasonable regulations upon the company for its use of the streets. While the Circuit Court of Appeals declared the existence of that general principle, yet it followed the Circuit Court in holding that the regulations set forth in the two ordinances of September 10, 1895, were void. In that the city respectfully insists that the court erred.

On page 91 of the record will be found the objections which the Court could specify against the two ordinances of September 10, 1895, marked "G" and "H." Against "G" two objections are made. First, that a petition must be filed praying for the privilege of erecting and maintaining poles and wires, where they now are, "in accordance with the conditions of this ordinance and such other con-

ditions as the Council may see fit to impose." Second, that the Council reserves the right to put at any time other restrictions and regulations. Having specified only these two objections, the Court proceeds to condemn the whole ordinance with these words: "And the whole tenor and effect of the ordinance is to put the company absolutely under the control of the city." It was thus that a whole ordinance of some twenty sections was condemned. Strange to say, the company itself had in its bill only made *one* objection to this ordinance, and that was as to the requirement of the petition—and that objection it made upon the false idea that to file said petition it would have to bind itself to remove its poles and wires, if the petition should be refused. It will be seen from a reading of the second section of the ordinance that no such promise was attempted to be extracted. If a party filed a petition, and it was refused, the status of the petitioner was not changed from what it was before he took that step. Yet the lower courts condemned the ordinance *in toto*.

The Circuit Court of Appeals then points out the supposed objectionable features in ordinance "H." It notices that the city proposes to require all companies to put their wires on certain streets in conduits—that the conduits shall be built large enough to hold double the number of wires then on the streets; these conduits to be used by all companies upon contributing a fair share of the expense. The charge for use of street to be $2.00 per wire per mile, until 1900—then the city to charge more, if it should deem proper. The privilege for the conduits to be for a term of fifteen years, at end of which term the city reserves rights to put other conditions. Strange to say, that the company in its bill of complaint nowhere makes any one of these objections. In fact, it points out no objection of any nature whatever to this ordinance "H."

The Court then closes its opinion as follows: "These are some of the conditions now imposed, with the right to impose any others which the Council may see fit. * * *

These conditions, regulations, and restrictions already prescribed by the City Council appear to be stimulated by a desire to oppress and control, perhaps defeat, the existence of the complainant, and so are not the lawful exercise of the police power." Thus these ordinances were declared invalid. We submit that the Court was not called upon to pick out, what it might deem expensive or burdensome features in the ordinances. It should have required the complainant to have specified in its bill the requirements deemed violative of some right. And until the company did so, and showed that it had offered to comply with all proper regulations, it should have refused it any standing in court. In *Missouri, Etc.*, vs. *Murphy, et al.*, 170 U. S., page 78, this Court said:

" If requirements were exacted or duties imposed by the ordinances, which, if enforced, would have impaired the obligations of the company's contract, this did not relieve the company from offering to do those things which it was lawfully bound to do. The exemption of the company from requirements inconsistent with its charter could not operate to relieve it from submitting itself to such police regulations as the city might lawfully impose. And until it had complied, or offered to comply, with regulations to which it was bound to conform, it was not in a position to assert, that its charter rights were invaded, because of other regulations, which, though applicable to other companies, it contended would be invalid if applied to it."

Here the company did not object, because the ordinances were burdensome or unreasonable, but it planted itself upon the claim, that it was above and beyond the power of the city. In its bill of complaint (on page 9) is several sentences of this import. One of them reads as follows: " Your orator further insists that, having accepted the provisions of the act of Congress of 1866, it is entitled to all the rights given thereby, independent of and superior

to the consent of the city of Richmond. One of these rights is the right to 'construct, maintain, and operate its lines' 'over and along' the streets of the said city."

Since the company choose to stand upon that position, we insist that the lower court, as soon as it declared that the company was liable to all reasonable regulations imposed by the city, ought to have refused the company any relief, as it had not alleged that it had offered to conform to all reasonable regulations.

We submit that the terms of said ordinance are not unreasonable. It is easy to understand why the city in 1884 should have reserved the right to repeal the ordinance of June 26, 1884. That ordinance did not undertake to limit or specify the routes to be occupied by the complainant. It authorized the use of "such routes as may be specified and agreed on by a resolution or resolutions of the Committee on Streets from time to time," &c. Having delegated so broad a power it was but the duty of the Council to protect the city by reserving the power of repeal. In the light also of the fact that the invention was at that time comparatively new, with its inconveniences not fully known, it was well to provide for any contingency which might require its removal. Such a contingency has, in the opinion of the city of Richmond, arisen as to a great many of the poles and wires of the complainant. That is shown by the ordinance of the said city, filed with the complainant's bill as Exhibit "H," requiring the removal of poles and wires from overhead in certain streets, and for the construction and use of conduits in the same. The streets specified in the ordinance are the most crowded thoroughfares in that city; and there, therefore, existed a necessity for its passage. This latter ordinance does not declare any desire or intention to drive the complainant from the city. It puts the complainant on the footing with any other telephone company. The bill of complaint so admits. (See page 7.) The second section of this ordinance declares that "the City Council will grant permission to *any* company, corporation, partnership or

individual to place its wires and electrical conductors in conduits under the surface of said streets of the city," &c., &c.

The language of the Court in the case of the *Telegraph Co.* vs. *San Francisco*, 45 Fed. Rep., 593, is appropriate on this point. "The order is general and applicable to all. If it is not enforced as to all, it ought to be, and the chief of police declares his purpose to enforce it, in all cases, that come to his notice. I see no good reason to believe that it was passed for the purpose of discrimination," &c., &c.

The record in this case shows that a company in opposition to the appellee company began operation under the terms of said ordinances "G" and "H" before the issuance of the injunction in this case. (See pages 9 and 69.) The ordinance "H" has not been enforced, because it would have been unfair to have done so, while the appellee company runs unrestrained by either of said ordinances.

The right of a city to require the placing of wires in conduits has been decided favorably by more than one court. Wallace, Judge, so held in *West. Un. Tel. Co.* vs. *Mayor of New York*, 3 Law Repts., Ann't'd, page 449. In the case of *Electric Imp. Co.* vs. *San Francisco*, 45 Fed. Rep., 593, there was discussed an ordinance requiring the removal of wires strung across tops of houses, and the Court said: "Should a raging fire occur, originated by the electric current, or otherwise, these dangerous wires might so obstruct the efforts of the firemen to extinguish it, as to result in the destruction of the entire city. It is certainly competent under the police powers of the State to suppress such dangerous erections in the interest of the common safety of the community." The validity and reasonableness of the New York statutes, requiring the use of underground conduits came under the consideration, also, of the Supreme Court of New York in *A. R. T. Co.* vs. *Hess, et al.*, 125 N. Y., 641. On page 642 that Court said: "It is quite true that the plaintiff could not remove its electrical conductors into the subways without some expense But the same is true of

railroads occupying streets: they cannot change from one style of rail to another, nor from one place in the street to another, nor make a change of grade without a considerable expense; and yet the mere fact that they are subjected to expense is no answer to the right of the public, in pursuance of law, to require them to comply with the prescribed regulations."

Then, commenting on the act of Congress here under discussion, the Court said: "The precise scope and range of operation of these sections within a State are not quite apparent, and cannot be easily defined. But this much, at least, must be true, that under them no telegraph company could interfere with the use of the streets and highways of the State, except under regulations prescribed for the control of all telegraph companies within the State; nor could such companies interfere with streets and highways in the State, so as materially to impair their usefulness as ordinary highways. Nor could these congressional acts deprive the State of its control over its highways and its right to regulate their use under the police power for the public welfare. The laws of Congress are perfectly satisfied by the permission granted to the plaintiff, of which it is perfectly feasible for it to avail itself to place its electrical conductors in the subways constructed beneath the surface of the streets.

An examination of the statutes of New York requiring the placing of electric wires in conduits will show that those statutes were far more stringent than the ordinance "H" here under discussion. (See Statutes of New York, 1885, Chapt. 499, §§ 3, 4, and 8, and Acts 1887, Chapt. 716.)

By ordinance "H" the privilege of building conduits was offered to any company without discrimination. Of course, the city would not allow all companies to build conduits. It would doubtless have granted permission to the first company applying. It would then very probably have required the next company desiring to run wires to enter and use the conduits of the first company, after making satisfactory terms for compensation, or having such com-

pensation determined by arbitration. It was with this view that the capacity of the conduits to be built were required to be double the then needed capacity. The object had in view was a reasonable one. It was to prevent a great nuisance to the public—the frequent tearing up of the streets. We insist that it was the duty of the city to anticipate, and to prevent, as far as possible, such injury to the streets and inconvenience to the general public. It is the duty of a municipal government in granting a franchise to look to the general public interest, and not to the advantage of some particular class. While its requirements should not be unnecessarily burdensome, yet it should make the privileged class bear, as far as possible, all reasonable burdens instead of the general public. Such is wise municipal government.

The right of a city to charge telegraph companies a fair rental for the right to erect each pole upon its highways cannot be denied. (See *St. Louis* vs. *West. Un. Tel. Co.*, 148 U. S., 592-597, and 149 U. S., pages 100-101.) In the latter decision the principle is announced that, "*prima facie*, an ordinance like that is reasonable."

In the case of *Allentown* vs. *West. Un. Tel. Co.*, 148 Pa. St. 117-119, an ordinance was held valid, which imposed a charge of $1.00 per annum on each pole carrying electric wires, and $2.50 per annum on each mile of wire. (See also *Chester* vs. *S. R. and P. Tel. Co.*, 148 Pa. St., page 120; *West. Un. Tel. Co.* vs. *Philadelphia*, 12 Abl. Rep. 144.

The charges imposed by the ordinances here under discussion are still more reasonable. By ordinance "G" the charge is $2.00 per annum per pole, but there is no charge made for the running of the wires carried on said pole. By ordinance "H," requiring the putting of wires on certain thoroughfares into underground conduits the only charge is that of $2.00 per wire per mile.

Thus we submit that when the provisions of these two ordinances, which are complained of, not by the company, but by the lower courts, are examined upon their own merits, or compared with those imposed by cities in other States,

they will be found not to have been passed, as intimated in the opinion of the Circuit Court of Appeals, to "defeat the existence of the complainant." They will be found to be reasonable and not unusual. When it is considered that by the use of the streets the companies are saved the enormous expense of purchasing land for a right of way—that a city frequently has to purchase such right of way—that it has to pay the expenses of improving and repairing its streets—that it furnishes to such companies all necessary police protection—it cannot fairly be said that the requirements and conditions of either of the ordinances are open to any just complaint. On the contrary, it cannot be fairly denied that they come within the principle announced in *Health Department* vs. *Rector*, 145 N. Y. 32-40, viz: they "tend in some appreciable and clear way towards the accomplishment of some one of the purposes which the Legislature has the right to accomplish under the exercise of the police power."

We submit that the facts above stated and the principles above quoted furnish a negative answer to the question put by the said Circuit Court of Appeals—whether "the ordinances of the city of Richmond prescribe regulations which will make the use burdensome and intolerable, and practically impossible."

It may be contended, as was contended in the arguments in the courts below, that section seven of the same ordinance is unreasonable. That section reads:

"The City Council hereby reserves the right to put at any time other restrictions and regulations as to the erection and use of said poles, wires, and other apparatus used in connection with the transmission of electricity, and from time to time require such poles as it may deem proper to be removed, and the wires thereon to be run in conduits upon such terms as the city may deem proper."

It was when noticing this alleged requirement that the Circuit Court of Appeals assumed a position strikingly con-

tradictory of the view it took of the effect of the repeal by the city of the contract ordinance of 1884. It held that the repeal by the city did not have the natural and expected effect of making the company remove its poles and wires from the street. But had the unexpected effect of relieving the company from any restraint of such contract, and planting such poles and wires firmly in the streets under an act of Congress, which the company had at first declined to accept. In other words, that the power *reserved in the contract* to repeal did not amount to anything, because of the act of Congress. Is such a construction of a contract a fair and reasonable one? Is it anything more than evasion? It is keeping the promise to the ear, but breaking it to the hope? Yet when the Court came to notice this alleged requirement of a petition, it used this language:

"Now, it goes without saying that if the complainant, notwithstanding its claim of protection under the act of Congress of 1866, were willing to file a petition to the City Council for the privilege of using its streets and alleys, and in that petition agreed, in consideration of its grant, to abide by any present or future condition, regulation, or restriction the Council may impose, this would be a binding contract, and would control the complainant. * * * * The courts could not review any ordinance to discover if it be within the lawful exercise of the police power, for the complainant would be bound by its contract to obey the ordinance, be it police regulation or not."

We submit that this objection to the ordinance cannot be sound, if the decision of the Court is correct as to the absolute *non-effect* of the repeal. Can the reserved power to repeal amount to nothing, yet the reserved power to amend be dangerous and destructive? In other words, is the lesser power the greater? If the effect of the repeal could be overcome by a declaration of the company that it would henceforth stand under the act of Congress, it would follow

that when an objectionable amendment should be passed, the company would decline thenceforth to exist under the ordinance, and claim the right to remain under the act of Congress. The right to shift its basis would exist in the one case as much as in the other.

We have seen that the right to require wires to be run in conduits is regarded as a reasonable requirement. It is a requirement which is being enforced daily in the large cities of this country. Hence no objection can be sustained as to the specific reservation. Nor can any be sustained as to the more general reservation of power. In the first place, a court is not to *presume* that under such reservation the city will put any unreasonable requirements "as *to the erection and use* of said poles," &c. The reservation is confined to the "erection and use." It indicates that the city desired to reserve power to make such requirements as might be necessary for the safety and comfort of her citizens. Such would be the construction which a court would put upon the language quoted.

"A power reserved to the Legislature to alter, amend, or repeal a charter authorizes it to make any alteration or amendment of a charter granted subject to it, which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the Legislature may deem necessary to secure either that object, or any public right." (*New York Co.* vs. *Bristol*, 151 U. S. 556-567.)

Such a reservation was a wise one. Surely it was fairer to have an express reservation of such power, than to silently depend upon that recognized principle so clearly stated in *Chicago Co.* vs. *Nebraska*, 170 U. S. 57-72, that, "when such contracts are entered into it is with the knowledge that parties cannot, by making agreements on subjects involving the rights of the public, withdraw such subjects from the police power of the Legislature." A principle which had been fully recognized in the previous case of *New York Co.* vs. *Bristol*, 151 U. S. 556. There this Court said:

"The governmental power of self-protection cannot be contracted away." (See page 567.)

A late decision of this court has declared that it is the duty of a municipal government to consider the future when granting a franchise. In *Detroit S. Ry. Co.* vs. *Detroit Rwy. Co.*, 171 U. S., pages 48-53, it said: "There were many reasons which urged to this—reasons which flow from the nature of municipal trust—even from the nature of legislative trust, and those which, without the clearest intention explicitly declared, insistently forbid that the future should be committed and bound by the conditions of the present time, and functions delegated for public purposes be paralyzed in their exercise by the existence of exclusive privileges."

We submit that the same forbiddance lies upon municipal governments as "immutable" privileges. Nor should any court hold that by reasons of those words the city could uselessly hamper or virtually destroy said company's property or rights. Suppose that the city should pass some unjust and unreasonable requirement, the courts would not uphold it. The first requirement for the validity of an ordinance is that it shall be "reasonable." Nor is the objection of any weight that "it fears it might thereby subject itself to requirements from which it insists it was exempted" by the act of Congress. (See *Missouri, Etc.*, vs. *Murphy, supra.*) In that case the Court said:

"We are unable to accede to the contention that * * the Street Commisisoner was obliged to permit it to excavate the streets for that purpose without the assent of the Board of Public Improvements or of the Municipal Assembly or effort to obtain either, on the mere averment of the company that it fears it might thereby subject itself to requirements, from which it insists it was exempted by the terms of its charter."

The said seventh section we submit does not afford any reason why the company should not have recognized

and proceeded in accordance with the terms of the said ordinance as to the joint use of poles of September 10, 1895.

We therefore submit that even if the court were right in holding that the company was protected as to its Richmond exchange by the said act of Congress, yet it should also have held that the said ordinances, made a part of the bill as Exhibits "G" and "H," were binding on the company, and that the company must proceed in accordance with its terms.

We submit, in recapitulation:

1st. That telephone companies do not come within the scope of said act of Congress.

2d. That the business of the appellee is not in any respect or to any extent interstate commerce.

3d. That if the messages sent and received to and from the Western Union Telegraph Company are of such a nature, yet all its other messages are merely local.

4th. That the ordinance of June 26, 1884, was in the nature of a contract, by the terms of which the company must abide, regardless of the nature of its business.

5th. That the ordinance of December 14, 1894, repealed the ordinance of June 26, 1884.

6th. That even if the city should be in error as to all of these positions, yet that the ordinances of September 10, 1895, as to joint use of poles and as to conduits, do not contain any unreasonable provisions.

It is submitted that the said final decree of the Circuit Court is erroneous and should have been reversed, and that the injunction should have been dissolved and the bill dismissed, and that in refusing so to decide the Circuit Court of Appeals erred.

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